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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, ) CR. NO. 09-156  
 )  
 vs. )  
 )  
 SHERMAN ALAN TURNER, )  
 )  
 Defendant. )  
 )

## TRANSCRIPT OF SUPPRESSION HEARING

May 18, 2009

— — —

BEFORE: THE HONORABLE GERALD BRUCE LEE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: OFFICE OF THE UNITED STATES ATTORNEY  
BY: J. CAM BARKER, ESQ.  
JOHN EISINGER, ESQ.  
2100 Jamieson Ave.  
Alexandria, Virginia 22314

FOR MR. TURNER:       OFFICE OF THE FEDERAL PUBLIC DEFENDER  
BY: AAMRA AHMAD, ESQ.  
                  TODD RICHMAN, ESQ.

— — —

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR  
U.S. District Court  
401 Courthouse Square  
Alexandria, VA 22314

09:57:20

RENECIA A. SMITH-WILSON, RMR, CRR

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10:02:24 1 (Thereupon, the following was heard in open  
10:02:24 2 court at 10:02 a.m.)

10:02:24 3 THE CLERK: 1:09 criminal 156, United States  
10:02:28 4 versus Sherman Alan Turner.

10:02:31 5 MR. BARKER: Good morning, Your Honor. Cam  
10:02:33 6 Barker and John Eisinger for the United States.

10:02:36 7 THE COURT: Good morning.

10:02:37 8 MS. AHMAD: Good morning, Your Honor. Aamra  
10:02:38 9 Ahmad and Todd Richman on behalf of Mr. Turner who is  
10:02:43 10 present.

10:02:43 11 THE COURT: Good morning.

10:02:46 12 Good morning, Mr. Turner.

10:02:47 13 I'm ready. I'm ready.

10:02:49 14 MS. AHMAD: Your Honor, would you first like  
10:02:50 15 to address the government's motion to quash or should we  
10:02:53 16 move forward with the evidentiary hearing?

10:02:56 17 THE COURT: I'm happy to proceed however you  
10:02:58 18 would like.

10:02:59 19 MS. AHMAD: I think we would first like to  
10:03:01 20 address the government's motion to quash.

10:03:02 21 THE COURT: All right.

10:03:08 22 MS. AHMAD: If you've had the opportunity to  
10:03:11 23 review the pleading that we filed Friday afternoon after  
10:03:14 24 the government filed its motion, you'll see that we  
10:03:17 25 believe that there are equitable reasons why the

10:03:20 1 subpoena that we have been trying to serve to Officer  
10:03:24 2 Daugherty should not be quashed and those reasons are  
10:03:26 3 that we followed the Park Police officer's instructions  
10:03:30 4 on how to serve the subpoena.

10:03:32 5 We applied for the subpoena in a timely  
10:03:35 6 manner one day after the hearing was moved. We received  
10:03:38 7 it last week, I believe on Monday or Tuesday, on  
10:03:43 8 May 11th.

10:03:43 9 We received it on May 11th from the Court.  
10:03:46 10 My office continued to contact the Park Police to see  
10:03:49 11 how it should properly be served and received those  
10:03:53 12 instructions on May 12th.

10:03:54 13 On May 13th, my office followed the  
10:03:57 14 instructions that the Park Police gave them.

10:04:00 15 Obviously it was not personally served. We  
10:04:02 16 don't deny that, and it wasn't until Friday that we were  
10:04:06 17 told that the Park Police was not going to accept  
10:04:08 18 service.

10:04:09 19 We have learned from the government that the  
10:04:12 20 witness is out of town.

10:04:15 21 THE COURT: Do you have his report? Does he  
10:04:18 22 have a report about this case?

10:04:19 23 MS. AHMAD: We do have his report, Your  
10:04:21 24 Honor.

10:04:21 25 THE COURT: And what does it say about this

10:04:23 1 case?

10:04:24 2 Was he involved in taking the statement, is  
10:04:32 3 my question.

10:04:33 4 MS. AHMAD: His report does not say that he  
10:04:35 5 was involved in taking the statement. It's a one  
10:04:37 6 sentence report, I believe.

10:04:38 7 THE COURT: Well, do you have any  
10:04:39 8 information he knows about the facts of this case?

10:04:42 9 MS. AHMAD: Yes, Your Honor. He was present  
10:04:44 10 during the search, and we believe that he was a witness  
10:04:46 11 to the conversation between Mr. Turner and Officer  
10:04:52 12 Freedman.

10:04:52 13 THE COURT: Well, your brief says that he  
10:04:55 14 came with the dog after the defendant was in the police  
10:04:57 15 car; is that right?

10:04:59 16 MS. AHMAD: That's correct. But, the  
10:05:01 17 conversation that occurred between Officer Freedman and  
10:05:04 18 Mr. Turner occurred after the canine officer arrived and  
10:05:10 19 while they were still on the scene.

10:05:16 20 THE COURT: Okay, Mr. Barker.

10:05:21 21 MR. BARKER: Well, I think there's two  
10:05:25 22 separate issues here. The first is whether the subpoena  
10:05:28 23 itself was properly served and the second is if it  
10:05:31 24 wasn't, what is the basis for a continuance.

10:05:34 25 Now, I think on the motion to quash, our

10:05:37 1 simple argument is that it was not personally served on  
10:05:40 2 this officer. He was on leave. His supervisor was not  
10:05:42 3 able to contact him, and he just can't or shouldn't be  
10:05:47 4 held to that under Rule 17 of the Federal Rules of  
10:05:50 5 Criminal Procedure.

10:05:50 6 As for the continuance and whether the  
10:05:53 7 subpoena was timely obtained, our position is that the  
10:05:57 8 subpoena should have been obtained during preparation or  
10:06:00 9 upon the filing of the defense's motion to suppress. I  
10:06:04 10 think you just heard the basis for anyone thinking in  
10:06:06 11 this case that Officer Daugherty has nonpunitive  
10:06:10 12 evidence is the defendant's information to his counsel  
10:06:13 13 that he thinks Officer Daugherty may have overheard  
10:06:16 14 something at the scene.

10:06:17 15 When the government talked to Officer  
10:06:20 16 Daugherty, he said he had not heard anything at the  
10:06:22 17 scene.

10:06:22 18 THE COURT: Well, do you want to address the  
10:06:24 19 issue about whether the Park Police misled counsel?

10:06:28 20 MR. BARKER: I'd be happy to answer that.  
10:06:30 21 And we think there's no equitable basis for that.  
10:06:33 22 There's sort of two equitable claims. The first is that  
10:06:35 23 we misled defense counsel, and the second is the Park  
10:06:38 24 Police did.

10:06:39 25 The first is that we told them that service

10:06:41 1 upon a Park Police supervisor would be sufficient. And  
10:06:45 2 that is not the case. I had a discussion with defense  
10:06:48 3 team. I believe it was Mr. Richman on May 4th about  
10:06:52 4 subpoenaing Officer Daugherty. And we had just received  
10:06:55 5 a two-week training summary, and so I pretty much did  
10:07:00 6 what that summary said which was to tell him that he  
10:07:02 7 would have to comply with any applicable *Touhy*  
10:07:06 8 regulations. But I never told him that *Touhy*  
10:07:09 9 regulations would be proper service of the subpoena.

10:07:11 10 I don't see why that would make sense.  
10:07:14 11 Again, service on a supervisor just couldn't suffice to  
10:07:17 12 constitute service on an employee who the supervisor may  
10:07:20 13 not have any contact with, especially in an eleventh  
10:07:23 14 hour case like this. So what I think happened --

10:07:25 15 THE COURT: Well, I want to make sure I  
10:07:27 16 understand. You and the defense were aware of the  
10:07:30 17 individuals present at the scene when Mr. Turner was  
10:07:32 18 arrested, right?

10:07:34 19 MR. BARKER: We became aware of that after  
10:07:36 20 the defense filed their motion to suppress and we  
10:07:38 21 started looking into what the facts were, correct.

10:07:41 22 THE COURT: And you knew the defense wanted  
10:07:42 23 to talk to Officer Daugherty or have him here?

10:07:45 24 MR. BARKER: Well, we didn't know that until  
10:07:47 25 they filed their motion to continue --

10:07:49 1 THE COURT: Right.

10:07:50 2 MR. BARKER: Right.

10:07:50 3 THE COURT: So it was no surprise to you  
10:07:52 4 that they wanted the officer here?

10:07:55 5 MR. BARKER: No, that's correct. There's no  
10:07:57 6 surprise to us that --

10:07:58 7 THE COURT: Well, do you think it would be  
10:08:00 8 unreasonable for defense counsel to reply upon your  
10:08:03 9 statement about how the *Touhy* regulations operated here?

10:08:06 10 MR. BARKER: I do, because I never stated  
10:08:09 11 that the *Touhy* regulations are sufficient to constitute  
10:08:12 12 effective service of a subpoena. And I never held that  
10:08:17 13 view and I never stated it.

10:08:18 14 THE COURT: So then in your view then in  
10:08:21 15 every case where you as a prosecutor has a case and you  
10:08:24 16 know that there's going to be a motion to suppress, then  
10:08:28 17 the government won't even assist the counsel for the  
10:08:32 18 defendant to try to bring the witnesses here. We have  
10:08:34 19 to chase down all of the witnesses, get subpoenas for  
10:08:37 20 all of them. Is that the way we have to do it all the  
10:08:39 21 time?

10:08:39 22 MR. BARKER: Well, I think this normal  
10:08:42 23 service principle apply --

10:08:44 24 THE COURT: Well, I wasn't asking you about  
10:08:45 25 service. I was asking you about just cooperating



10:08:47 1 amongst lawyers for a hearing that has been moved once  
10:08:50 2 to try to bring all the material witnesses here.

10:08:52 3 MR. BARKER: It is --

10:08:53 4 THE COURT: Would you let me finish.

10:08:55 5 Do you think it was appropriate for you to  
10:08:56 6 just try and see if there was a way to get Officer  
10:09:00 7 Daugherty here?

10:09:00 8 MR. BARKER: If it was a material witness, I  
10:09:02 9 think so. If he had said he had --

10:09:02 10 THE COURT: So because you made a judgment  
10:09:03 11 that the witness was not material, you didn't make the  
10:09:06 12 extra effort to try to cooperate?

10:09:09 13 MR. BARKER: I mean I guess that's right.  
10:09:11 14 It's because Officer Daugherty didn't have anything to  
10:09:14 15 add.

10:09:14 16 THE COURT: Okay. Well, let me say  
10:09:16 17 something to you. I'm going to make sure you understand  
10:09:18 18 something here. You may be absolutely right,  
10:09:21 19 Mr. Barker, that the rules do not require you to give  
10:09:26 20 legal advice to defense counsel.

10:09:28 21 Defense counsel should be able to figure out  
10:09:30 22 for themselves what witnesses should be brought and how  
10:09:32 23 the rules should be followed.

10:09:33 24 But, I think that what you should know is  
10:09:37 25 that the Court would expect the lawyers to talk to each

10:09:44 1 other. And if there was some problem with Officer  
10:09:48 2 Daugherty being on vacation to bring to the Court's  
10:09:51 3 attention so that we could work out not having everybody  
10:09:54 4 here all at one time for something you thought was not  
10:09:56 5 material.

10:09:57 6 And, I want to make sure you understand what  
10:10:00 7 I'm saying to you is what I think the other judges in  
10:10:03 8 this court would say, too, and that is that this is  
10:10:04 9 obviously a matter of some importance to the government  
10:10:07 10 and to the defendant. And for you to make an individual  
10:10:10 11 judgment that it was not important enough to try to call  
10:10:13 12 Officer Daugherty on the telephone is just very  
10:10:15 13 disappointing to me and may have some consequences. I  
10:10:18 14 just want to make sure you're clear about that.

10:10:20 15 MR. BARKER: I understand. The Park Police  
10:10:21 16 did try to get ahold of Officer Daugherty when this  
10:10:24 17 case --

10:10:24 18 THE COURT: I said what I would expect you  
10:10:26 19 to do --

10:10:26 20 MR. BARKER: Uh-huh.

10:10:27 21 THE COURT: -- as the lawyer for the  
10:10:28 22 government --

10:10:28 23 MR. BARKER: Uh-huh.

10:10:28 24 THE COURT: -- whose job it is to seek  
10:10:31 25 justice.

10:10:33 1 MR. BARKER: Okay. I understand that. And  
10:10:35 2 I think the Court understands that in our view, just  
10:10:39 3 didn't have any material information, but I understand  
10:10:40 4 what --

10:10:41 5 THE COURT: I know, but I want to make sure  
10:10:43 6 you're listening to me because it is one of the reasons  
10:10:45 7 that sometimes cases are dismissed because of a failure  
10:10:48 8 to disclose exculpatory evidence, because a prosecutor  
10:10:52 9 looks at the evidence and says well, this is not  
10:10:54 10 exculpatory. It does not exonerate the accused when the  
10:10:56 11 definition of exculpatory evidence is much broader than  
10:10:57 12 whether or not it exonerates the accused.

10:10:59 13 So as a teaching moment I'm trying to say to  
10:11:02 14 you that I want you to see that this judge thinks that  
10:11:05 15 your judgment about what the witness has to say is not  
10:11:09 16 the way to make the determination of whether or not you  
10:11:12 17 cooperate with counsel.

10:11:15 18 MR. BARKER: Okay, I -- I understand that.

10:11:17 19 THE COURT: Okay. I want to make sure you  
10:11:19 20 get that part of it.

10:11:19 21 MR. BARKER: Okay.

10:11:20 22 THE COURT: All right. Now, as it relates  
10:11:21 23 to the law, your view is that *Touhy* regulations do not  
10:11:25 24 apply in this context because it only applies in civil  
10:11:28 25 cases; is that right?

10:11:29 1 MR. BARKER: Our view is two fold, that the  
10:11:31 2 *Touhy* regulations do not change normal service  
10:11:34 3 principles.

10:11:35 4 In the first place, they impose additional  
10:11:39 5 requirements to allow the appropriate department a  
10:11:42 6 chance to review the request for information and  
10:11:46 7 determine whether to assert certain privileges, but they  
10:11:49 8 don't excuse compliance with normal service principles.

10:11:53 9 Even if they did by their terms, they do not  
10:11:56 10 apply to this criminal context.

10:11:58 11 As for the equitable positions, I realize  
10:12:01 12 that I talked to the defense counsel about *Touhy*  
10:12:03 13 regulations. And I think what must have happened is  
10:12:07 14 defense counsel was calling to ask what was sufficient  
10:12:10 15 to be service. I was notifying them that compliance  
10:12:13 16 with *Touhy* was necessary and we must have had a  
10:12:16 17 miscommunication there.

10:12:16 18 I also did talk to the Park Police officer  
10:12:19 19 on Friday before we filed this motion to quash, and I  
10:12:21 20 let the defense counsel know this by voicemail.

10:12:24 21 And I asked her did she have any contact  
10:12:28 22 with the subpoena in this case, and she told me that  
10:12:31 23 earlier in the week a defense investigator called her  
10:12:34 24 asking about service of a civil subpoena and that she  
10:12:38 25 remembers specifically that it was a civil subpoena

10:12:41 1 because that's what she does. She doesn't do criminal  
10:12:45 2 subpoenas.

10:12:45 3 And she told the investigators that she  
10:12:47 4 would -- they do serve civil subpoenas on her. Now, I  
10:12:50 5 understand in their response they're offering to provide  
10:12:52 6 testimony from the investigator that Major Smith was  
10:12:57 7 accepting service of a criminal subpoena.

10:12:59 8 We didn't get this response until after the  
10:13:01 9 close of business Friday, and so we don't have Major  
10:13:05 10 Smith here and have time to subpoena her to get her  
10:13:08 11 here.

10:13:08 12 But, you know, I don't think that affects  
10:13:09 13 the calculus because the legal requirement is one of  
10:13:11 14 simply just providing notice to the witness of where to  
10:13:14 15 be and when.

10:13:14 16 But to the extent that that informs the  
10:13:16 17 equitable calculus, we would just meet that as well.  
10:13:21 18 So, that's our basis on the motion to quash.

10:13:23 19 THE COURT: All right.

10:13:24 20 MR. BARKER: And as for the continuance,  
10:13:27 21 again, I think if the -- beginning from the time when  
10:13:29 22 the suppression motion was filed, if Officer Daugherty  
10:13:33 23 was nearby and heard anything, the only reason defense  
10:13:37 24 counsel would think that could be because their client  
10:13:39 25 told them so. And that was -- provide ample time to

10:13:42 1 subpoena him before the originally scheduled suppression  
10:13:46 2 hearing date, for this suppression hearing date.

10:13:49 3 You know, the defense counsel never asked us  
10:13:51 4 to tell Officer Daugherty voluntarily that they were  
10:13:56 5 going to subpoena him. And, you know, we had been  
10:13:59 6 telling them that Officer Daugherty didn't have any  
10:14:01 7 information.

10:14:01 8 And so, to a certain extent, I think I was  
10:14:04 9 waiting for the subpoena to come in to understand that  
10:14:06 10 they wanted him although I agree, you know, the basis  
10:14:08 11 for the original motion was that they wanted to have him  
10:14:11 12 here.

10:14:12 13 And so, I think with that --

10:14:14 14 THE COURT: I think you did interview  
10:14:16 15 Officer Daugherty yourself.

10:14:17 16 MR. BARKER: I talked to him on the phone  
10:14:19 17 and he told me, that's right, that he was there at the  
10:14:21 18 scene and he ran the dog over, that he did not interact  
10:14:25 19 with the defendant and didn't overhear any sort of  
10:14:28 20 interactions with the defendant.

10:14:29 21 THE COURT: Thank you.

10:14:34 22 MS. AHMAD: May I address some of the points  
10:14:36 23 that the government raised?

10:14:38 24 THE COURT: Yes.

10:14:40 25 MS. AHMAD: First of all, we agree with

10:14:41 1 their reading on the *Touhy* regulations and we're not  
10:14:45 2 asking to -- to -- for the Court to deny their motion  
10:14:50 3 based on the *Touhy* regulations.

10:14:52 4 We're only asked for that based on the  
10:14:54 5 equitable reasons that we followed the Park Police's  
10:14:57 6 instructions.

10:14:57 7 And also just to be clear, I don't think  
10:15:03 8 that the government attorneys ever told us that that  
10:15:05 9 would be sufficient service. It was the Park Police.  
10:15:09 10 So, we're not trying to say that the government  
10:15:11 11 attorneys actually said that.

10:15:12 12 Mr. Rivera our investigator is available  
10:15:17 13 here. He's ready to testify as to his conversation with  
10:15:20 14 the Park Police and that he did inform them that it was  
10:15:24 15 a criminal subpoena or a subpoena in a criminal case and  
10:15:28 16 that he was put on hold, and they came back and said  
10:15:31 17 that's fine because they were concerned that it was  
10:15:33 18 criminal and not civil. But they ended up telling him  
10:15:36 19 that that was fine.

10:15:37 20 We're not asking for a continuance here.  
10:15:39 21 We're asking to bifurcate the hearing to give us the  
10:15:42 22 opportunity to serve the officer after he returns  
10:15:46 23 presumably after May 27th and to continue the hearing  
10:15:50 24 after that date in order to give him the opportunity to  
10:15:53 25 testify.

10:15:54 1 That's all.

10:15:57 2 THE COURT: Well, let's start with this is a  
10:16:00 3 motion to suppress the statement to Officer Freedman,  
10:16:03 4 right?

10:16:03 5 MS. AHMAD: Yes, Your Honor.

10:16:04 6 THE COURT: And so, would you agree that the  
10:16:06 7 key witnesses in that situation are going to be Officer  
10:16:09 8 Freedman and I assume your client and any other person  
10:16:13 9 who -- and this detective who was at the police station.  
10:16:16 10 That's it, right?

10:16:18 11 MS. AHMAD: Well, I think that those are at  
10:16:20 12 the minimum the most necessary witnesses. I do think  
10:16:23 13 that Daugherty is also an important witness because we  
10:16:26 14 do believe that he was privy to the interrogation with  
10:16:29 15 my client.

10:16:31 16 THE COURT: But, the bottom line is that  
10:16:33 17 what you're trying to do is suppress the statement  
10:16:35 18 allegedly made by Mr. Turner to Officer Freedman?

10:16:38 19 MS. AHMAD: Yes, the statement was made to  
10:16:40 20 Officer Freedman, not -- not to Officer Daugherty.

10:16:43 21 THE COURT: All right. I'm going to deny  
10:16:46 22 the motion to quash. I'm going to deny the motion to  
10:16:49 23 bifurcate. We're going to go forward with what we have  
10:16:52 24 today and we'll hear the witness testimony.

10:16:57 25 You may proceed.



10:17:04 1 MR. BARKER: Thank you, Your Honor. The  
10:17:05 2 United States calls Officer Lynda Freedman.

10:17:16 3 MS. AHMAD: Excuse me, Your Honor. I would  
10:17:18 4 just like to ask for the rule on witnesses.

10:17:19 5 THE COURT: All right. Any witnesses in the  
10:17:21 6 courtroom? No. All right.

10:17:22 7 If you all let us know if any witnesses come  
10:17:24 8 into the courtroom, please.

10:17:36 9 THEREUPON, LYNDIA FREEDMAN, having been duly  
10:17:38 10 sworn, testified as follows:

10:17:38 11 THE WITNESS: Yes, I do.

10:17:43 12 MR. BARKER: May I proceed, Your Honor?

10:17:49 13 THE COURT: Yes.

10:17:49 14 DIRECT EXAMINATION

10:17:49 15 BY MR. BARKER:

10:17:50 16 Q. Would you please state and spell your first and  
10:17:52 17 last name for the record.

10:17:53 18 A. Officer Lynda Freeman, F-R-E-E-D-M-A-N.

10:17:58 19 Q. And your first name is spelled?

10:18:00 20 A. L-Y-N-D-A, I'm sorry.

10:18:02 21 Q. Who is your employer?

10:18:03 22 A. I'm employed by the United States Park Police.

10:18:05 23 Q. And were you so employed on January 9th of this  
10:18:07 24 year?

10:18:07 25 A. Yes, I was.

10:18:09 1 Q. What is your position with the Park Police?

10:18:11 2 A. I'm a patrol officer for the George Washington  
10:18:14 3 Memorial Parkway, District Two station.

10:18:17 4 Q. And how long have you done that?

10:18:18 5 A. I've been with the Park Police since June of  
10:18:21 6 1999.

10:18:22 7 Q. Were you on duty the morning of January 9, 2009?

10:18:26 8 A. Yes, I was.

10:18:27 9 Q. And, were you in uniform?

10:18:28 10 A. Yes, I was.

10:18:29 11 Q. Were you armed?

10:18:30 12 A. Yes, I was.

10:18:32 13 Q. That morning did you come into contact with the  
10:18:37 14 defendant, Sherman Turner?

10:18:38 15 A. Yes, I did.

10:18:39 16 Q. Would you please identify him in court here  
10:18:41 17 today.

10:18:41 18 A. Yes, gentlemen sitting between his two lawyers  
10:18:46 19 blue shirt, gray jacket.

10:18:48 20 MR. BARKER: Your Honor, may the record  
10:18:50 21 reflect the witness has identified the defendant?

10:18:53 22 THE COURT: So noted.

10:18:54 23 BY MR. BARKER:

10:18:55 24 Q. Where did you come in contact with the defendant?

10:18:57 25 A. I came into contact with him in the back parking

10:19:01 1 lot of Belle Haven Park.

10:19:04 2 Q. About what time?

10:19:05 3 A. Approximately quarter to one, almost 1 a.m.

10:19:12 4 Q. And is that park close or open at dark?

10:19:14 5 A. It's posted closed at dark.

10:19:17 6 Q. Where in the parking lot was the defendant's  
10:19:19 7 vehicle?

10:19:20 8 A. There are three parking lots in -- for Belle  
10:19:24 9 Haven Park. He was in the very northern-most lot  
10:19:28 10 closest to the water.

10:19:30 11 Q. With the assistance of the court security  
10:19:32 12 officer, I'd like to hand you what's been marked for  
10:19:36 13 identification as Government's Exhibit 2, a copy of  
10:19:38 14 which has been provided to the defense counsel and an  
10:19:44 15 extra copy of which I do have for the Judge if the court  
10:19:47 16 security officer would be so kind as to pass that up.

10:19:54 17 Is this a fair and accurate depicts of the Belle  
10:19:58 18 Haven parking lot area as it was configured on  
10:20:01 19 January 9th of this year?

10:20:01 20 A. The configuration is -- I said it was 1 a.m. --  
10:20:06 21 almost 1 a.m. in the morning and his vehicle was the  
10:20:10 22 only vehicle in any of the three parking areas.

10:20:12 23 Q. Can you just please describe for us where the  
10:20:14 24 Belle Haven parking area is. Is it to the right of the  
10:20:17 25 road labeled George Washington Memorial Parkway?

10:20:20 1 A. Yes, closest to the water.

10:20:22 2 Q. Do you see on the upper left-hand corner of this  
10:20:25 3 picture there's a parking lot with two rows of parking  
10:20:28 4 spaces?

10:20:28 5 A. Yes.

10:20:29 6 Q. And then below that there's a parking lot with  
10:20:31 7 one row?

10:20:32 8 A. Yes.

10:20:32 9 Q. And then below that there's another parking lot  
10:20:34 10 with two rows?

10:20:35 11 A. That's correct.

10:20:36 12 Q. Where -- which of those three parking lots was  
10:20:39 13 the defendant's vehicle in?

10:20:40 14 A. The very northern most, towards the top of the  
10:20:43 15 page.

10:20:44 16 Q. Do you see near the top of the page in the north  
10:20:47 17 part of that parking lot, there's like a blue car there?

10:20:50 18 A. A dark color.

10:20:51 19 Q. Dark color. Where in relation to that was the  
10:20:54 20 defendant's vehicle?

10:20:55 21 A. Within one or two spaces, just north of that  
10:21:02 22 vehicle.

10:21:03 23 THE COURT: I'm sorry, could you point to  
10:21:05 24 which one you're looking at.

10:21:08 25 THE WITNESS: To the north, Your Honor. Up

10:21:09 1 towards the top, you have the dark one.

10:21:11 2 THE COURT: All the way up at the top?

10:21:13 3 THE WITNESS: Yes, it's on the far right.

10:21:14 4 And then his vehicle was either in the  
10:21:16 5 space -- one or two spaces above that one.

10:21:20 6 THE COURT: Thank you.

10:21:22 7 BY MR. BARKER:

10:21:22 8 Q. What kind of vehicle was it?

10:21:24 9 A. I believe it was a Chevy pickup truck.

10:21:29 10 Q. What direction was it facing in the parking lot  
10:21:31 11 space?

10:21:32 12 A. He was backed into the space, so he would have  
10:21:34 13 been facing westbound or towards the west.

10:21:41 14 MR. BARKER: Your Honor, we're not moving  
10:21:42 15 this into evidence, but we would ask that Government's  
10:21:45 16 Exhibit 2 be made part of the record in this case as a  
10:21:48 17 demonstrative.

10:21:48 18 THE COURT: All right.

10:21:50 19 BY MR. BARKER:

10:21:50 20 Q. How close to the George Washington Memorial  
10:21:53 21 Parkway was the defendant's truck?

10:21:55 22 A. Sixty, 70 feet.

10:21:58 23 Q. At the defendant's truck, could you see other  
10:22:00 24 cars going by along the Parkway?

10:22:03 25 A. If they passed by at that time of the morning,

10:22:06 1 yes.

10:22:06 2 Q. Were the leaves on the trees at this time of the  
10:22:09 3 year?

10:22:09 4 A. Not that I recall, no.

10:22:11 5 Q. When you got to the scene, how many -- were you  
10:22:15 6 the only officer?

10:22:16 7 A. Yes, I was.

10:22:17 8 Q. And, what did you do upon seeing the defense  
10:22:20 9 vehicle there?

10:22:21 10 A. Rolled it -- drove into the parking area, parked,  
10:22:28 11 sort of catty-corner to him, used my spotlight and  
10:22:36 12 illuminated the cab of the truck.

10:22:39 13 Q. How many people were inside of the cab of the  
10:22:41 14 truck?

10:22:41 15 A. Two.

10:22:42 16 Q. What were they doing?

10:22:44 17 A. Trying to get clothes on.

10:22:49 18 Q. Did you get out of your cruiser and approach the  
10:22:51 19 truck?

10:22:52 20 A. Yes, I did.

10:22:52 21 Q. What did you do when you got there?

10:22:54 22 A. I approached the vehicle from the passenger side,  
10:22:59 23 it was a four-door pickup. I observed a female who I  
10:23:05 24 later identified as Ms. Weeks. She was, from what I  
10:23:11 25 could see at that point, completely naked. I saw

10:23:16 1 Mr. Turner sitting in the left rear back of the truck.  
10:23:25 2 He began reaching down. I could tell he didn't have a  
10:23:28 3 shirt on.

10:23:29 4 I then opened the door of the -- the rear door of  
10:23:35 5 the pickup.

10:23:37 6 Q. Why did you open the door?

10:23:38 7 A. Because of the furtive movement, for my safety.

10:23:42 8 Q. Upon opening the door, what if anything did you  
10:23:44 9 smell?

10:23:45 10 A. As I opened the door, I had a large plume of  
10:23:49 11 smoke bellow out, and it smelled as if it was a burned  
10:23:58 12 marijuana cigarette.

10:23:59 13 Q. Upon smelling that smoke, what did you ask the  
10:24:03 14 subjects to do, the occupants of the car?

10:24:04 15 A. I had them first get dressed and asked for their  
10:24:08 16 IDs.

10:24:09 17 Q. Did you ask them to get out of the car?

10:24:11 18 A. After they were dressed, yes.

10:24:14 19 Q. And, what identifications did they provide?

10:24:19 20 A. Driver's licenses.

10:24:26 21 Q. Based on the marijuana smoke, what did you decide  
10:24:29 22 to do next?

10:24:30 23 A. Do a search for more contraband or search for any  
10:24:35 24 contraband that may be in the vehicle.

10:24:39 25 Q. What did you find?

10:24:41 1 A. I later found on the center console a Newport  
10:24:47 2 cigarette box with burn marijuana -- what appeared to be  
10:24:52 3 burn marijuana cigarettes.

10:24:53 4 Q. And what did you do upon finding what appeared to  
10:24:56 5 be the marijuana cigarettes?

10:24:59 6 A. I believe I handcuffed -- if I remember  
10:25:08 7 everything, I handcuffed or detained Mr. Turner, had Ms.  
10:25:13 8 Weeks sit down on the curb. I was going to ask  
10:25:17 9 Mr. Turner to sit down. He said because he had a  
10:25:19 10 prosthetic leg that he couldn't -- he didn't have it on  
10:25:24 11 correctly or there was a problem. I asked him, fine, to  
10:25:25 12 sit on the left rear -- towards the left rear bumper of  
10:25:27 13 his truck.

10:25:29 14 Q. Why did you handcuff the defendant?

10:25:31 15 A. For my safety.

10:25:33 16 Q. Did you tell him that he was under arrest?

10:25:35 17 A. No, I did not.

10:25:38 18 Q. Turning back to the vehicle search, after you  
10:25:42 19 found what appeared to be the marijuana cigarettes, what  
10:25:46 20 radio communications did you have?

10:25:48 21 A. I advised our communication section through --  
10:25:51 22 via my force-issued portable radio that I had minor  
10:25:56 23 narcotics.

10:25:57 24 Q. And who was the first officer to respond after  
10:25:59 25 that?



10:26:00 1 A. Officer Vinyard.

10:26:03 2 Q. How did he come to the scene?

10:26:05 3 A. In his cruiser, assigned cruiser for the unit.

10:26:10 4 Q. So, at that point, there were two cruisers at the  
10:26:13 5 scene?

10:26:13 6 A. Yes, they were.

10:26:14 7 Q. And when he arrived, where were the defendant and  
10:26:16 8 the other occupant, Ms. Weeks taken?

10:26:19 9 A. Mr. Turner was escorted over to Officer Vinyard's  
10:26:26 10 cruiser and placed in the right rear seat of the  
10:26:29 11 cruiser. And Ms. Weeks was placed in the right rear  
10:26:35 12 seat of my cruiser.

10:26:36 13 Q. Why were they being moved to the cruisers?

10:26:39 14 A. I wanted to keep them separated, too, because of  
10:26:43 15 the elements. It was fairly cold the night -- or  
10:26:46 16 morning.

10:26:46 17 Q. You wanted to keep them separated for security  
10:26:49 18 reasons?

10:26:50 19 A. Correct.

10:26:50 20 Q. Had you decided whether to arrest Mr. Turner and  
10:26:53 21 the defendant at that point?

10:26:54 22 A. No.

10:26:57 23 Q. Why not?

10:26:58 24 A. With that minor amount of narcotics, we don't  
10:27:02 25 necessarily always arrest everybody.

10:27:05 1 Q. So, had you told the defendant whether he was  
10:27:07 2 arrest at that point?

10:27:10 3 A. Not that I recall, no.

10:27:12 4 Q. Who was the next officer to arrive?

10:27:13 5 A. Officer Daugherty.

10:27:15 6 Q. Which office is he from?

10:27:17 7 A. He works for our special forces branch as a  
10:27:21 8 canine officer.

10:27:22 9 Q. And, what did he do when he arrived?

10:27:25 10 A. I advised him that I had found some possible  
10:27:29 11 marijuana, asked him if he'd let his dog go through the  
10:27:34 12 vehicle.

10:27:34 13 Q. And, did the dog give some response at places on  
10:27:41 14 the truck?

10:27:41 15 A. Officer Daugherty I believe told me later that  
10:27:44 16 the dog seem interested somewhere near the front --  
10:27:47 17 center front console of the pickup.

10:27:48 18 Q. During your search of the truck for the  
10:27:52 19 narcotics, what else did you find relevant to this case?

10:27:55 20 A. As we were searching the front -- the center  
10:28:00 21 console of the pickup truck, Officer Vinyard was looking  
10:28:04 22 in the back passenger area, and he was in -- he had a  
10:28:08 23 better vantage points and he advised me that he observed  
10:28:13 24 what appeared to be a handle of a firearm.

10:28:18 25 Q. Did you see that gun as well?

10:28:20 1 A. Once he advised me of it, I was able to get up  
10:28:24 2 higher and look down between the seat and the center  
10:28:26 3 console and observed it.

10:28:28 4 Q. So, he didn't touch the gun?

10:28:29 5 A. No, I recovered the weapon.

10:28:32 6 Q. You removed the gun from between the driver seat  
10:28:37 7 and the center console?

10:28:38 8 A. Yes.

10:28:38 9 Q. What did you do with it once you recovered it?

10:28:41 10 A. Once I recovered it, I made the weapon safe,  
10:28:44 11 emptied the magazine, locked the chamber to the rear.

10:28:49 12 Q. Let's turn to the permit for a little bit. Have  
10:28:51 13 you had previous case where a person found in the park  
10:28:55 14 with a handgun had a gun permit?

10:28:57 15 A. Yes.

10:28:57 16 Q. Because of the permit, what happened in that case  
10:29:00 17 or cases?

10:29:00 18 A. He was -- the case I had several -- a few years  
10:29:04 19 ago had a gentleman who had a weapon on the Parkway, did  
10:29:08 20 not realize that he couldn't have weapons on the -- he  
10:29:11 21 didn't realize that GW Parkway was a federal parkway and  
10:29:15 22 that he couldn't have a weapon.

10:29:19 23 He stated or advised me that he had a  
10:29:23 24 carry/conceal permit. He produced that permit, ran a  
10:29:29 25 check of the weapon, made sure it wasn't stolen, advised

10:29:33 1 him that this was federal parkway or federal land and  
10:29:38 2 that he couldn't have that weapon even though he had a  
10:29:40 3 permit.

10:29:42 4 I then seized the weapon, wrote a report,  
10:29:48 5 forwarded it to the U.S. Attorney's Office, and U.S.  
10:29:54 6 Attorney Rose Haney declined prosecution on him.

10:29:58 7 Q. Was the defendant arrested in that case?

10:29:59 8 A. No, he was not.

10:30:00 9 Q. So, what is the significant of the permit in your  
10:30:02 10 summons versus arrest decision?

10:30:05 11 A. People don't realize that the George -- that the  
10:30:07 12 George Washington Memorial Parkway is a federal parkway.  
10:30:11 13 And unlike other areas in Virginia where you have a  
10:30:17 14 carry/conceal permit where it would be somewhat legal to  
10:30:22 15 have, it's not the case on the Parkway.

10:30:24 16 Q. And because of that would your summons arrest  
10:30:27 17 decision be affected by a permit?

10:30:29 18 A. It -- yes.

10:30:31 19 Q. Before you had any further interactions with the  
10:30:34 20 defendant, had you reached the conclusion about who the  
10:30:36 21 gun belonged to?

10:30:39 22 A. The fact that the vehicle was registered to  
10:30:42 23 Mr. Turner, the seat -- the weapon was found on the  
10:30:48 24 driver's side to the right of the seat and into the  
10:30:52 25 center console where if you're driving, you'd stick your

10:30:56 1 hand right down and you could pull it out. I made the  
10:31:00 2 assumption the weapon was his.

10:31:01 3 Q. Based on that determination, what did you ask the  
10:31:03 4 defendant next?

10:31:06 5 A. I walked over to Officer Vinyard's cruiser,  
10:31:10 6 opened the door, leaned in and just asked him did he  
10:31:19 7 have a permit -- something to the effect of did he have  
10:31:22 8 a permit for the weapon.

10:31:23 9 Q. So, you had been at the defendant's truck and  
10:31:26 10 walked to Officer Vinyard's cruiser; is that right?

10:31:30 11 A. Yes.

10:31:30 12 Q. Was the window on the rear area up or down?

10:31:34 13 A. I believe it was up.

10:31:35 14 Q. And then you opened the rear door of his cruiser?

10:31:38 15 A. Yes.

10:31:39 16 Q. Did you get into the cruiser to ask the question  
10:31:41 17 or asked him from outside?

10:31:43 18 A. I think I had my arm up on top of the door frame  
10:31:47 19 and just leaned in and asked him.

10:31:49 20 Q. And, as precisely as you can recall, what did you  
10:31:53 21 ask the defendant at that point?

10:31:55 22 A. Something to the effect of do you have a permit  
10:31:56 23 for the weapon or do you have a permit.

10:32:00 24 Q. And to be clear, you did not read the defendant  
10:32:03 25 Miranda warnings before asking that permit question,

10:32:06 1 correct?

10:32:06 2 A. No, I did not.

10:32:07 3 Q. Why not?

10:32:08 4 A. Hadn't decided whether he was going to be under  
10:32:11 5 arrest at that point in time. Like I said, giving him  
10:32:15 6 the opportunity that maybe he did have a conceal/carry  
10:32:19 7 permit.

10:32:22 8 Q. Was your question designed to elicit an  
10:32:25 9 incriminating response?

10:32:27 10 A. No.

10:32:32 11 Q. In asking that question, were you thinking ahead  
10:32:35 12 to how an interview at the police station would be  
10:32:38 13 performed?

10:32:38 14 A. No.

10:32:39 15 Q. Did you have any specific plans for an interview  
10:32:42 16 of the defendant at the police station?

10:32:43 17 A. I hadn't thought that far, formulated anything at  
10:32:47 18 that point, no.

10:32:48 19 Q. At that point, did you know Detective Monahan was  
10:32:52 20 at the police station?

10:32:53 21 A. No, I did not.

10:32:54 22 Q. In the course of preparing for this hearing, have  
10:32:57 23 you been made aware of a so-called question-first  
10:33:00 24 interrogation strategy in which an officer who knows  
10:33:04 25 Miranda warnings are required deliberately withholds the

10:33:08 1 warnings, obtains a confession and then have herself or  
10:33:12 2 other officer re -- Mirandize for the first time the  
10:33:15 3 defendant, re-asked the question and obtain this time a  
10:33:18 4 Mirandized confession?

10:33:19 5 A. We went over that in the prep this morning, yes.

10:33:23 6 Q. Is there any Park Police policy directing  
10:33:25 7 officers to use a question-first interrogation technique  
10:33:31 8 of that nature?

10:33:32 9 A. No, there's not.

10:33:33 10 Q. Have you ever been instructed informally to use a  
10:33:36 11 technique of that nature?

10:33:37 12 A. No, I have not.

10:33:38 13 Q. Were you in fact using a technique of that nature  
10:33:41 14 on January 9th?

10:33:43 15 A. No.

10:33:44 16 Q. When you asked the defendant if he had a permit,  
10:33:46 17 what did the defendant say?

10:33:47 18 A. I can't remember exactly if he said no or shook  
10:33:54 19 his head, but his body language.

10:33:56 20 Q. He indicated no in some way?

10:33:58 21 A. Right, and plus his body language just made me  
10:34:02 22 believe that he knew he shouldn't have had that weapon.

10:34:05 23 Q. And was it at that point you made the arrest  
10:34:08 24 decision?

10:34:08 25 A. In my mind, yes.

10:34:10 1 Q. Did you arrest him because he lacked the permit?

10:34:15 2 A. The totality of the circumstances.

10:34:19 3 Q. Did you ask the defendant any more questions  
10:34:21 4 about the gun?

10:34:22 5 A. No.

10:34:23 6 Q. Why not?

10:34:24 7 A. I knew I hadn't Mirandized him. I wanted to do  
10:34:29 8 all that in a more formal setting at the station. I  
10:34:33 9 knew I wasn't going to ask him any more questions.

10:34:36 10 Q. Do you recall whether you told the defendant if  
10:34:38 11 he was under arrest at that point?

10:34:39 12 A. I don't recall, sorry.

10:34:43 13 Q. About what time was the arrest?

10:34:46 14 A. Somewhere between one -- anywhere after 1:15,  
10:34:55 15 maybe 1:30, a little bit longer. I don't recall the  
10:34:58 16 exact times.

10:34:59 17 Q. When you decided to arrest the defendant, what if  
10:35:02 18 anything did you discuss with him about what would be  
10:35:05 19 done with his truck?

10:35:07 20 A. I don't recall exactly if I told him or I advised  
10:35:11 21 Officer Vinyard to tell him that I was going to secure  
10:35:13 22 the vehicle on scene and bring the keys back with me.

10:35:17 23 Q. So, you may have had further interactions with  
10:35:19 24 him about the truck, but you don't --

10:35:21 25 A. Just letting him know what was going to happen



10:35:24 1 with his vehicle.

10:35:24 2 Q. Where was the defendant taken at that point?

10:35:26 3 A. Officer Vinyard transported Mr. Turner from the  
10:35:29 4 scene to District Two.

10:35:31 5 Q. To the District Two police station?

10:35:33 6 A. Yes, I'm sorry.

10:35:34 7 Q. Of the U.S. Park Police?

10:35:36 8 A. Yes.

10:35:37 9 Q. And did you follow Officer Vinyard there at that  
10:35:40 10 point or did you stay at the scene?

10:35:41 11 A. I remained on scene.

10:35:42 12 Q. Why did you remain at the scene?

10:35:45 13 A. We had called Ms. Weeks's mother to come pick her  
10:35:49 14 up, and we had to wait for -- as I didn't want to leave  
10:35:55 15 her out there in the cold waiting for somebody not  
10:35:58 16 knowing how long they were going to be. So --

10:36:01 17 Q. How long did you wait until --

10:36:03 18 A. It could have been a minimum of a half hour,  
10:36:06 19 maybe longer.

10:36:08 20 Q. Do you recall if it was before or after 2 a.m.?

10:36:11 21 A. May have been around that time. I don't recall  
10:36:15 22 exactly.

10:36:16 23 Q. Well, after Ms. Weeks's mother came, where did  
10:36:19 24 you go?

10:36:20 25 A. I then went -- proceeded directly to District

10:36:25 1 Two.

10:36:25 2 Q. Whom did you encounter there?

10:36:29 3 A. My sergeant and Officer Monahan or Detective  
10:36:33 4 Sergeant Monahan.

10:36:34 5 Q. What did Detective Sergeant Monahan offer to do?

10:36:38 6 A. He asked if I wanted him to do the interview --  
10:36:42 7 try and do the interview.

10:36:43 8 Q. And what did you say?

10:36:44 9 A. I told him I'd greatly appreciate it.

10:36:47 10 Q. Why would you greatly appreciate it?

10:36:50 11 A. He has a lot better -- he has excellent people  
10:36:55 12 and interview skills. He is more thoroughly trained in  
10:36:58 13 interviewing since he works as a detective sergeant.

10:37:02 14 Q. What else were you doing while the interview took  
10:37:04 15 place?

10:37:05 16 A. During the interview, I was trying to process the  
10:37:08 17 evidence.

10:37:10 18 Q. Well, before the interview started, did you tell  
10:37:14 19 Detective Monahan what the defendant said or -- about a  
10:37:17 20 gun permit at the scene of the stop?

10:37:19 21 A. I don't recall telling him any of that.

10:37:22 22 Q. Did you tell him about any oral statements the  
10:37:26 23 defendant made at the scene of the stop?

10:37:28 24 A. Not that I recall, no.

10:37:30 25 Q. I assume you told Officer Monahan the nature of

10:37:33 1 the case?

10:37:34 2 A. He knew -- he was listening to the radio and he  
10:37:38 3 knew part of it and I may have shown him the weapon that  
10:37:41 4 I recovered as well as the possible narcotics.

10:37:46 5 Q. Where did the interview occur in the police  
10:37:49 6 station?

10:37:50 7 A. In our processing area.

10:37:52 8 Q. Where were you when Detective Monahan began the  
10:37:56 9 interview?

10:37:57 10 A. When he was doing the Miranda, I was in what we  
10:37:59 11 call our 200 area which is an office directly -- there's  
10:38:05 12 a door that leads into the processing and has a mesh  
10:38:09 13 window.

10:38:10 14 Q. So, did you witness Detective Monahan administer  
10:38:14 15 the defendant Miranda rights?

10:38:16 16 A. Yes, I did.

10:38:17 17 Q. Where did you witness that from?

10:38:18 18 A. From the 200 area.

10:38:20 19 Q. So you were not in the interview room but in the  
10:38:22 20 adjacent room?

10:38:24 21 A. Correct.

10:38:24 22 Q. Did you later sign the Miranda card that  
10:38:27 23 memorializes the warnings administered?

10:38:30 24 A. Yes, I did.

10:38:31 25 Q. With the assistance of the court security

10:38:32 1 officer, I'd like to hand you what's been marked for  
10:38:35 2 identification as Government's Exhibit 1. I have an  
10:38:38 3 extra copy for Your Honor and a copy is provided to  
10:38:44 4 defense counsel.

10:38:54 5 Do you recognize this document?

10:38:55 6 A. Yes, I do.

10:38:56 7 Q. What is it?

10:38:57 8 A. It's a photocopy of the front and back of our  
10:39:01 9 Miranda cards that we read.

10:39:04 10 Q. Is that the Miranda card that you signed?

10:39:06 11 A. Yes, it's a -- it is a copy of one I signed.

10:39:09 12 Q. How do you know that?

10:39:10 13 A. My signature is the last signature. It has --  
10:39:15 14 also has my badge number on it.

10:39:18 15 Q. Did you participate in Detective Monahan's  
10:39:21 16 interview of the defendant?

10:39:22 17 A. No, I did not.

10:39:23 18 Q. Where were the other officers in the  
10:39:27 19 station during the interview of the defendant?

10:39:29 20 A. They were -- if there wasn't -- in the station,  
10:39:33 21 they were -- I believe my sergeant was in the report  
10:39:37 22 writing room that I later went to start the different  
10:39:44 23 paperwork for the evidence and my reports that needed to  
10:39:47 24 be subsequently written.

10:39:50 25 Q. Turning your attention to your interactions with

10:39:53 1 the defendant that morning including at the scene of the  
10:39:55 2 stop, what tone of voice did you use to speak to the  
10:39:58 3 defendant?

10:39:59 4 A. Professional.

10:40:02 5 Q. Comparable to the tone you're using now?

10:40:06 6 A. Somewhat, yes.

10:40:06 7 Q. In what respects was it different?

10:40:09 8 A. Piercing loud noise and a helicopter above. I  
10:40:13 9 may have had to talk up because of the outside factors.

10:40:18 10 Q. How cooperative was the defendant at the stop?

10:40:21 11 A. He appeared fairly cooperative.

10:40:24 12 Q. And, did the defendant seem frightened at the  
10:40:27 13 stop?

10:40:28 14 A. Not that I read or felt.

10:40:31 15 Q. Did you ever draw your weapon?

10:40:33 16 A. No, I did not.

10:40:34 17 Q. Did you ever brandish your weapon?

10:40:36 18 A. No.

10:40:37 19 Q. Did you ever threaten the defendant?

10:40:39 20 A. No.

10:40:41 21 Q. Did the defendant ever say anything to indicate  
10:40:43 22 that he felt threatened?

10:40:44 23 A. No, not that I recall.

10:40:48 24 MR. BARKER: With the Court's indulgence a  
10:40:49 25 moment.

10:40:59 1 BY MR. BARKER:

10:41:00 2 Q. Turning your attention back to the scene of the  
10:41:02 3 stop when you went to Officer Vinyard's cruiser to ask  
10:41:05 4 the defendant about the permit, where were the other  
10:41:08 5 officers when you asked that question?

10:41:10 6 A. I believe that Officer Daugherty and Officer  
10:41:14 7 Vinyard were trying to recover a sword cane that was in  
10:41:21 8 the very back --

10:41:22 9 Q. A sword cane being an item of evidence also found  
10:41:25 10 in the defendant's truck?

10:41:26 11 A. Yes.

10:41:27 12 Q. Where was Ms. Weeks when you --

10:41:30 13 A. She was still in the back of my cruiser.

10:41:32 14 Q. Were the windows in that cruiser also up?

10:41:35 15 A. Yes, they were.

10:41:38 16 MR. BARKER: No further questions, Your  
10:41:40 17 Honor.

10:41:41 18 CROSS-EXAMINATION

10:41:41 19 BY MR. RICHMAN:

10:41:49 20 Q. Good morning, Officer Freedman.

10:41:50 21 A. Good morning.

10:41:50 22 Q. How long have you been with the U.S. Park Police?

10:41:53 23 A. Since June of 1999.

10:41:55 24 Q. So, just about ten years?

10:41:56 25 A. Yes, sir.

10:41:57 1 Q. And, your regular duties in the Park Police,  
10:42:01 2 you've been a patrol officer that whole time?

10:42:03 3 A. Yes, sir.

10:42:03 4 Q. So, your regular duties include traffic stops?

10:42:06 5 A. Yes.

10:42:06 6 Q. And, you work full time for the Park Police?

10:42:10 7 A. Yes, I do.

10:42:11 8 Q. And has that been true regularly since  
10:42:15 9 January 9th, the time of this incident?

10:42:17 10 A. Yes.

10:42:18 11 Q. And, in a typical shift, you interact with  
10:42:22 12 members of the public virtually every shift, correct?

10:42:25 13 A. Yes, sir.

10:42:26 14 Q. And that includes issuing summons and citations?

10:42:29 15 A. Citations, warning notices.

10:42:31 16 Q. And making arrests?

10:42:33 17 A. Yes, sir.

10:42:33 18 Q. And, that's been true for all your shifts, full  
10:42:37 19 time for the four months since this arrest, correct?

10:42:40 20 A. Yes, sir.

10:42:41 21 Q. Now, on the night of January 9th, you had  
10:42:44 22 testified that you started your investigation about  
10:42:46 23 quarter of one?

10:42:47 24 A. Approximately. I think the -- according to the  
10:42:52 25 radio logs, I went out with it at 12:47.

10:42:57 1 Q. And, the reason you approached the vehicle you  
10:43:01 2 said was because it was in Belle Haven Park after  
10:43:03 3 closing?

10:43:04 4 A. Yes, sir.

10:43:05 5 Q. And, the vehicle was a pickup truck?

10:43:08 6 A. Yes, sir.

10:43:08 7 Q. A Chevy Silverado?

10:43:11 8 A. I believe that's correct, yes.

10:43:13 9 Q. And this is just for clarification. This is an  
10:43:15 10 extended cab truck with four doors?

10:43:17 11 A. Yes.

10:43:20 12 Q. Now, you said the truck was parked in the far  
10:43:22 13 northern part of the lot, correct?

10:43:26 14 A. Yes, sir.

10:43:26 15 Q. And almost in the back corner of the lot?

10:43:30 16 A. Correct.

10:43:30 17 Q. And you said you parked your car catty-corner to  
10:43:34 18 his vehicle?

10:43:34 19 A. His vehicle is parked here. I think I came in at  
10:43:37 20 an angle. I believe I did.

10:43:40 21 Q. How close did you bring your car to his car?

10:43:43 22 A. Six, 10 feet, maybe.

10:43:45 23 Q. Was it parked in such a way as to block him in to  
10:43:51 24 the extent that you could?

10:43:54 25 A. I may have. I don't recall.



10:43:55 1 Q. I mean, you didn't pull up and park next to him?

10:43:58 2 A. No, sir.

10:43:59 3 Q. And, you shined your spotlight towards his  
10:44:04 4 vehicle?

10:44:04 5 A. I believe I did.

10:44:05 6 Q. And was his vehicle, was the cab facing towards  
10:44:07 7 the water or out towards your car?

10:44:09 8 A. Out towards the Parkway.

10:44:12 9 Q. And, your vehicle, the front of your car was  
10:44:14 10 towards the front of his car?

10:44:16 11 A. Yes, sir.

10:44:16 12 Q. With your spotlight towards his?

10:44:19 13 A. I believe so, yes.

10:44:20 14 Q. Did you have your blue lights on?

10:44:22 15 A. I don't recall turning my emergency equipment on,  
10:44:26 16 no, sir.

10:44:26 17 Q. And when Officer Vinyard later came, where did he  
10:44:29 18 park in relation to the two other vehicles?

10:44:32 19 A. He was to -- from what I remember, to the right,  
10:44:37 20 the passenger side of the pickup.

10:44:40 21 Q. And, how far away from the pickup?

10:44:43 22 A. Maybe the same distance. I don't recall exactly.

10:44:48 23 Q. And when you approached the pickup truck, you saw  
10:44:52 24 that there were two occupants?

10:44:53 25 A. Yes, sir.

10:44:53 1 Q. And you saw they were in a state of undress?

10:44:56 2 A. Yes, sir.

10:44:56 3 Q. And you said you then opened the right rear door?

10:44:59 4 A. I believe that's the one I opened, yes.

10:45:01 5 Q. So you would have had to walk around to the far  
10:45:04 6 side of the pickup, then?

10:45:06 7 A. Yes, sir.

10:45:06 8 Q. And you opened the right rear door. You said you  
10:45:09 9 immediately smelled an odor of marijuana?

10:45:12 10 A. Correct.

10:45:13 11 Q. And, that was coming from inside the vehicle or  
10:45:15 12 at least that's what you believed?

10:45:17 13 A. Yes.

10:45:18 14 Q. And in response to that, that's why you ordered  
10:45:24 15 the occupants out of the vehicle, correct?

10:45:26 16 A. One of the reasons, yes.

10:45:28 17 Q. What were the other reasons?

10:45:29 18 A. The furtive movement that Mr. Turner was doing at  
10:45:33 19 this time. I didn't realize at that time that he had a  
10:45:35 20 prosthetic leg that he was trying to I assume reattach.

10:45:42 21 Q. And when you ordered them out, you subsequently  
10:45:46 22 identified them by their licenses, correct?

10:45:49 23 A. Yes, sir.

10:45:50 24 Q. And according to your report at that point, you  
10:45:53 25 detained them, right?

10:45:54 1 A. Yes, sir.

10:45:55 2 Q. And, the reason for that at that time you wanted  
10:45:59 3 to search the vehicle for marijuana, right?

10:46:02 4 A. For possible contraband in the vehicle, yes, sir.

10:46:06 5 Q. Including marijuana, obviously --

10:46:08 6 A. Yes.

10:46:09 7 Q. -- based on the smell of marijuana?

10:46:10 8 A. Yes, sir.

10:46:13 9 Q. And, so they were detained, but they weren't  
10:46:17 10 handcuffed at this point, right?

10:46:19 11 A. I don't recall when I actually handcuffed him.  
10:46:22 12 If I -- I know it was -- there was two of them versus  
10:46:28 13 one of me, so I may have handcuffed them right away. I  
10:46:31 14 don't recall.

10:46:31 15 Q. They weren't placed in police vehicles at that  
10:46:34 16 point?

10:46:34 17 A. No.

10:46:35 18 Q. They were made to wait outside the truck while  
10:46:39 19 you served?

10:46:40 20 A. I did a quick cursory search, yes, sir.

10:46:44 21 Q. And in that quick cursory search, you found the  
10:46:47 22 Newport cigarette box?

10:46:48 23 A. Yes, sir.

10:46:49 24 Q. And that was on top of the center console?

10:46:52 25 A. Yes.

10:46:53 1 Q. And in that what you found to be marijuana  
10:46:56 2 cigarettes?

10:46:56 3 A. Yes.

10:47:00 4 Q. And is this when Officer Vinyard arrived?

10:47:02 5 A. No, I hadn't even put the -- from what I remember  
10:47:06 6 the sequence of events, I don't think I said anything on  
10:47:09 7 the air that point. It wasn't until after I made the  
10:47:14 8 radio transmission of that minor narcotics.

10:47:19 9 Q. And how long after you made that transmission  
10:47:22 10 that Officer Vinyard arrived?

10:47:26 11 A. Anywhere between 10, 15 minutes. He was coming  
10:47:32 12 from D.C.

10:47:34 13 Q. And, after you found that marijuana, well, at  
10:47:39 14 some point after you found the marijuana, I guess you  
10:47:42 15 don't -- strike that.

10:47:43 16 At some point during the search, you chose to  
10:47:46 17 handcuff Mr. Turner?

10:47:47 18 A. I believe so, yes.

10:47:49 19 Q. And, you cuffed him behind his back?

10:47:51 20 A. Yes, sir.

10:47:51 21 Q. And, you knew about somewhere around this time  
10:47:58 22 that he had a prosthetic leg?

10:48:01 23 A. Yes, sir.

10:48:01 24 Q. And, at some point, you placed him on the back of  
10:48:06 25 Officer Vinyard's cruiser?

10:48:08 1 A. After Officer Vinyard arrived, yes.

10:48:11 2 Q. This was before you had retrieved the firearm  
10:48:14 3 from the vehicle?

10:48:15 4 A. Right.

10:48:15 5 Q. Because Officer Vinyard was one of the people  
10:48:18 6 that helped you find the firearm?

10:48:20 7 A. Correct.

10:48:21 8 Q. So, after Officer Vinyard got there and after you  
10:48:24 9 found the firearm, by that point Mr. Turner was in the  
10:48:27 10 back of the vehicle, correct?

10:48:29 11 A. Once Officer Vinyard arrived on the scene,  
10:48:33 12 because it was cold that night and I wanted to keep  
10:48:36 13 Mr. Turner and Ms. Weeks separated, Mr. Turner was  
10:48:39 14 placed in Officer Vinyard's cruiser.

10:48:41 15 Q. So, it was before the search that revealed the  
10:48:44 16 gun?

10:48:44 17 A. Correct.

10:48:45 18 Q. And, he was still cuffed at that time?

10:48:47 19 A. Yes.

10:48:47 20 Q. And he was still cuffed behind his back?

10:48:50 21 A. Yes, sir.

10:48:50 22 Q. And the door to the cruiser was closed?

10:48:52 23 A. I believe so, yes, sir.

10:48:54 24 Q. And, in fact, Officer Daugherty also arrived  
10:48:58 25 sometime during this search as well?

10:49:02 1 A. He -- he arrived at some point, yes.

10:49:06 2 Q. And, he had a police canine with him when he  
10:49:10 3 arrived?

10:49:10 4 A. Yes.

10:49:10 5 Q. And there was also a Park Police helicopter  
10:49:14 6 overhead?

10:49:15 7 A. It had been there earlier before Officer Vinyard  
10:49:17 8 got there.

10:49:18 9 Q. And Park Police officer had been shining it's  
10:49:22 10 lights down on the scene?

10:49:23 11 A. Illuminating the area, yes, sir.

10:49:26 12 Q. And, you testified that after the firearm was  
10:49:30 13 found, you walked over and asked Mr. Turner if he had a  
10:49:33 14 permit for the gun?

10:49:34 15 A. Yes.

10:49:35 16 Q. Now, you didn't Mirandize him prior to asking him  
10:49:37 17 that question?

10:49:38 18 A. No, I did not.

10:49:39 19 Q. And he was still cuffed?

10:49:40 20 A. Yes, sir.

10:49:41 21 Q. And he was still in the back of the cruiser?

10:49:43 22 A. Yes.

10:49:43 23 Q. And, that's the only question that you asked?

10:49:46 24 A. Yes.

10:49:48 25 Q. You didn't do anything else to establish

10:49:50 1 ownership of the gun?

10:49:51 2 A. Not that I recall, no.

10:49:53 3 Q. You didn't, for example, ask if Ms. Weeks had a  
10:49:56 4 permit for it?

10:49:57 5 A. Not that I recall, no.

10:49:59 6 Q. And, following his response to that question, you  
10:50:02 7 arrested him for weapons offense, correct?

10:50:05 8 A. In my mind, yes.

10:50:07 9 Q. You didn't arrest Ms. Weeks for a weapons  
10:50:10 10 offense?

10:50:11 11 A. No.

10:50:11 12 THE COURT: When you say in your mind, what  
10:50:13 13 did you mean? Did you say it out loud?

10:50:15 14 THE WITNESS: Not that I recall, Your Honor.

10:50:17 15 BY MR. RICHMAN:

10:50:17 16 Q. So, you had some basis for distinguishing him  
10:50:22 17 from Ms. Weeks obviously?

10:50:25 18 A. Yes.

10:50:25 19 Q. And something about his response you took as an  
10:50:28 20 acknowledgment that it was his gun, correct?

10:50:30 21 A. Yes.

10:50:30 22 Q. Because you didn't even ask Ms. Weeks whether she  
10:50:34 23 had a permit?

10:50:36 24 A. Concerning where I found the vehicle, the vehicle  
10:50:39 25 was his, where the weapon was found and basically, his

10:50:43 1 body language when I asked him that led me to believe  
10:50:47 2 that it was his.

10:50:48 3 Q. You don't recollect exactly what he said when you  
10:50:50 4 asked the question, right?

10:50:51 5 A. He shook his head no or said no and then his  
10:50:57 6 shoulders kind of dropped and he sort of hung his head  
10:51:01 7 down.

10:51:01 8 Q. And you took that as an acknowledgment that was  
10:51:03 9 his gun?

10:51:03 10 A. I did.

10:51:05 11 Q. And, now you testified earlier that you have  
10:51:13 12 interactions with the public virtually every shift,  
10:51:16 13 right?

10:51:16 14 A. Yes, sir.

10:51:16 15 Q. And you work, what four or five shifts a week?

10:51:20 16 A. Typical is three one week and four the next.

10:51:24 17 Q. In any event, it's been four months now since  
10:51:27 18 this stop on January 9th, right?

10:51:29 19 A. Yes, sir.

10:51:30 20 Q. And, so you've done maybe a dozen or more shifts  
10:51:35 21 a month?

10:51:35 22 A. Yes, sir.

10:51:36 23 Q. So you've 50 or so shifts since then?

10:51:40 24 A. At least, yes, plus or minus.

10:51:42 25 Q. You've had many, many interactions with the



10:51:44 1 public during all those shifts, correct?

10:51:49 2 A. Yes, sir.

10:51:50 3 Q. And sometime during the course of your job,  
10:51:52 4 you're called to testify about your interactions, right?

10:51:54 5 A. Yes.

10:51:54 6 Q. And you have to do so under oath, right?

10:51:56 7 A. Yes, sir.

10:51:57 8 Q. And you have to be truthful?

10:51:58 9 A. Yes, sir.

10:51:59 10 Q. And complete and accurate?

10:52:00 11 A. Yes, sir.

10:52:01 12 Q. And, that's one of the reasons you write police  
10:52:04 13 reports?

10:52:05 14 A. It's true.

10:52:07 15 Q. Because without the benefit of one of your  
10:52:10 16 reports, you wouldn't be able to sit here today and  
10:52:13 17 recite the exact conversation you had with a drunk  
10:52:16 18 driver that you pulled over three or four or five months  
10:52:19 19 ago, correct?

10:52:20 20 A. Correct.

10:52:20 21 Q. Or his exact performance on field sobriety tests?

10:52:25 22 A. Yes.

10:52:25 23 Q. You need your reports to do that, right?

10:52:27 24 A. Yes, sir.

10:52:28 25 Q. And, so it's important as part of your job that

10:52:32 1 you have to make reports of all those interactions that  
10:52:34 2 you have to the extent they're relevant to a case,  
10:52:37 3 right?

10:52:37 4 A. Yes, sir.

10:52:37 5 Q. And, you try to make those accurate -- those  
10:52:41 6 reports accurate and truthful --

10:52:43 7 A. Yes, sir.

10:52:43 8 Q. -- and thorough?

10:52:48 9 In this case, you did make a police report,  
10:52:50 10 right?

10:52:50 11 A. Yes, I did.

10:52:51 12 Q. And, you reviewed it prior to your testimony?

10:52:55 13 A. Yes, sir.

10:52:56 14 Q. And you didn't mention anything about your  
10:52:58 15 questioning of Mr. Turner, did you?

10:53:02 16 A. If -- the only question I asked him was about the  
10:53:06 17 permit. And no, I did not put that in.

10:53:10 18 Q. And, you swore to an affidavit in support of a  
10:53:14 19 criminal complaint later that same day, didn't you,  
10:53:17 20 against Mr. Turner?

10:53:21 21 A. I believe I came back in later, yes. I don't  
10:53:24 22 remember exactly when I did it.

10:53:25 23 Q. But, you did swear to an affidavit in support of  
10:53:31 24 a criminal complaint?

10:53:32 25 A. Yes.

10:53:32 1 Q. And in that report, you didn't mention anything  
10:53:34 2 about any pre-Miranda question you asked of Mr. Turner?

10:53:37 3 A. Not that I recall, no.

10:53:38 4 Q. And two months later, you testified in a grand  
10:53:42 5 jury in the case for Mr. Turner, correct?

10:53:44 6 A. That's correct.

10:53:44 7 Q. And, in that testimony, you didn't mention  
10:53:46 8 anything about your pre-Miranda question of Mr. Turner?

10:53:51 9 A. I may have. I don't recall the grand jury.

10:53:56 10 Q. Would you like to review your testimony? Would  
10:53:58 11 that refresh your recollection as to whether you  
10:54:00 12 mentioned that interaction?

10:54:03 13 A. Yes, please.

10:54:05 14 MR. RICHMAN: I'm handing up what I'm  
10:54:08 15 marking as Defense Exhibit 1, and I have a copy I can  
10:54:19 16 show Your Honor.

10:54:27 17 Q. And I refer you to pages three to four where it  
10:54:32 18 discusses your finding the firearm.

10:54:54 19 You didn't mention anything about your  
10:54:55 20 pre-Miranda question to Mr. Turner in that testimony,  
10:54:59 21 did you?

10:54:59 22 A. No, I didn't.

10:55:00 23 Q. And that was on March 24, 2009?

10:55:02 24 A. Yes, sir.

10:55:04 25 Q. So, the first time you advised anyone about that

10:55:09 1 conversation was in April of this year?

10:55:17 2 A. I'm not sure when I --

10:55:21 3 Q. It was after an issue had been raised by the  
10:55:25 4 attorneys, correct?

10:55:26 5 A. It's possible. I don't recall.

10:55:27 6 Q. As to whether or not you had any pre-Miranda  
10:55:30 7 questioning of Mr. Turner?

10:55:33 8 A. I see.

10:55:33 9 Q. You don't have a basis to disagree with that, do  
10:55:36 10 you?

10:55:36 11 A. Not to my recollection, no.

10:55:43 12 Q. So, without a report, you still believe you  
10:55:47 13 can -- you recollect exactly the conversation you had  
10:55:49 14 with Mr. Turner that night?

10:55:52 15 A. Parts of it, yes, sir.

10:55:53 16 Q. You don't recollect all of it?

10:55:55 17 A. No, sir.

10:55:55 18 Q. So, there could have been more?

10:55:58 19 A. After he was in handcuffs and in the back of the  
10:56:00 20 cruiser, no. I knew I didn't want to ask him any more  
10:56:04 21 questions because it would invoke Miranda.

10:56:12 22 Q. Now, in the grand jury, you did testify about  
10:56:14 23 seeing -- that Detective Monahan elicited from  
10:56:18 24 Mr. Turner after he was Mirandized, correct?

10:56:20 25 A. Yes, sir.

10:56:21 1 Q. And you know he was Mirandized before those  
10:56:23 2 statements because he signed the waiver as you said on  
10:56:26 3 direct?

10:56:27 4 A. Correct.

10:56:27 5 Q. And from where you were watching those Miranda  
10:56:32 6 warnings, you could see Mr. Turner and Detective  
10:56:36 7 Monahan, right?

10:56:37 8 A. Yes.

10:56:37 9 Q. And Mr. Turner then could see you?

10:56:40 10 A. If he turned the chair that he was sitting in,  
10:56:45 11 it's bolted down and set to face pretty much one  
10:56:49 12 direction, and I would have been at his back.

10:56:52 13 Q. This was about two hours after the arrest?

10:56:55 14 A. Approximately, yes, sir.

10:56:56 15 Q. And, you had watched through the room where he  
10:56:58 16 was during the time he was detained in there, correct?

10:57:02 17 A. At different points in the morning, yes, sir.

10:57:06 18 Q. And at the moment the Miranda warnings were read,  
10:57:10 19 you were visible from where he was seated if he had  
10:57:14 20 looked in the correct direction?

10:57:15 21 A. It's possible.

10:57:16 22 Q. And, he'd been in continuous custody of the Park  
10:57:21 23 Police from the time of -- at Belle Haven Park until  
10:57:24 24 this interview, right?

10:57:25 25 A. Yes, sir.

10:57:25 1 Q. He hadn't made any phone calls?

10:57:30 2 A. At that point, no.

10:57:32 3 Q. Didn't have a lawyer present?

10:57:34 4 A. No, sir.

10:57:35 5 Q. And before Detective Monahan questioned  
10:57:43 6 Mr. Turner, he had to be made aware of the facts,  
10:57:45 7 correct?

10:57:46 8 A. I may have shown Detective Monahan the suspected  
10:57:52 9 narcotics and the weapon that I found.

10:57:53 10 Q. And, you would have had to have told him where it  
10:57:57 11 was found, right?

10:57:58 12 A. I don't recall what I said to Detective Monahan.

10:58:01 13 Q. Well, you must have told him that you had reason  
10:58:03 14 to believe it was Mr. Turner as opposed to Ms. Weeks?

10:58:08 15 A. I do not recall exactly what I told him.

10:58:10 16 Q. Well, you didn't ask him to question Ms. Weeks,  
10:58:13 17 did you?

10:58:13 18 A. Ms. Weeks was not at the station.

10:58:17 19 Q. Again, you didn't ask him to question her; is  
10:58:20 20 that right?

10:58:22 21 A. No, sir.

10:58:22 22 Q. So, clearly you made it known to Detective  
10:58:26 23 Monahan that it was your belief based on what you  
10:58:28 24 learned at the stop that it was Mr. Turner's gun?

10:58:31 25 A. I don't recall making a statement like that or

10:58:33 1 anything to that effect.

10:58:41 2 Q. And -- Court's indulgence briefly, Your Honor.

10:59:12 3 By the time of Detective Monahan's investigation,  
10:59:15 4 you were aware that Mr. Turner had a felony conviction  
10:59:20 5 from the 80s?

10:59:21 6 A. I didn't recall exactly when I was made aware of  
10:59:25 7 that.

10:59:25 8 Q. Was -- was it your understanding that Detective  
10:59:32 9 Monahan was doing an investigation for a misdemeanor  
10:59:34 10 charge or a felony charge?

10:59:35 11 A. I have no idea what Detective Monahan was --

10:59:40 12 Q. In any event, the purpose of his interview was  
10:59:43 13 simply to establish ownership of the firearm, correct?

10:59:49 14 A. I think it was broader than just the weapon,  
10:59:52 15 involving narcotics and everything else.

10:59:54 16 Q. The point was to establish ownership, though?

10:59:56 17 A. I'm not sure what Detective Monahan's point was.  
11:00:00 18 We just --

11:00:03 19 Q. Well, you had the weapon, correct?

11:00:05 20 A. Yes, sir.

11:00:06 21 Q. You had the suspected narcotics?

11:00:08 22 A. Yes, sir.

11:00:09 23 Q. The one thing you didn't have for a case was a  
11:00:15 24 post-Miranda statement establishing ownership of those  
11:00:18 25 items, correct?

11:00:19 1 A. Correct.

11:00:19 2 Q. So, that would have been the point of the  
11:00:21 3 interview, correct?

11:00:22 4 A. It may have been one of the points of the  
11:00:24 5 interview, yes, sir.

11:00:34 6 MR. RICHMAN: Nothing further, Your Honor.

11:00:37 7 REDIRECT EXAMINATION

11:00:37 8 BY MR. BARKER:

11:00:46 9 Q. Stepping back in time to your question to the  
11:00:48 10 defendant at the car about the permit, were you  
11:00:53 11 attempting to elicit ownership of the gun with that  
11:00:57 12 statement?

11:00:57 13 A. No, it was like an incident that I had several  
11:01:02 14 years back where there was a gentleman on the Parkway  
11:01:07 15 just further south of that area. He happened to have a  
11:01:10 16 weapon, and he also had a conceal/carry permit and he  
11:01:14 17 was not arrested.

11:01:17 18 Q. And then moving forward in time to the station  
11:01:20 19 house when you were witnessing the Miranda warnings and  
11:01:23 20 when you were in the room next to the interview room,  
11:01:26 21 did you notice the defendant looking at you while he was  
11:01:29 22 in the interview room and you were --

11:01:31 23 A. Not that I recall.

11:01:32 24 Q. I'm sorry.

11:01:33 25 A. Not that I recall.



11:01:34 1 Q. And then turning to your report, is your report  
11:01:39 2 intended to be a general summary of your observations or  
11:01:42 3 include every specific detail?

11:01:44 4 A. General summary with as -- you know, as much  
11:01:49 5 pertinent details as possible.

11:01:50 6 Q. Why didn't you mention the pre-Miranda question  
11:01:54 7 about the permit in your report?

11:01:57 8 A. At that point, I didn't feel it was necessary --  
11:02:01 9 subsequently necessary.

11:02:04 10 Q. And then moving on to the complaint and the grand  
11:02:08 11 jury, was the defendant charged with possession of a  
11:02:11 12 firearm in a park in violation of the park relations or  
11:02:15 13 possession of a firearm by a felon in violation of the  
11:02:19 14 U.S. Code?

11:02:21 15 A. Possession of a firearm by a felon later on.

11:02:26 16 Q. Is having a permit an element -- or lacking a  
11:02:28 17 permit an element of the federal violation?

11:02:30 18 A. Yes.

11:02:30 19 Q. I'm sorry. Is --

11:02:31 20 A. I believe it is, yes.

11:02:35 21 Q. Well, let me rephrase that. In your complaint,  
11:02:41 22 did you attest to whether the defendant had a permit for  
11:02:44 23 the weapon at all?

11:02:45 24 A. No.

11:02:46 25 Q. And, did you get into that with the grand jury?

11:02:50 1 A. Somewhat, I believe.

11:02:53 2 Q. At the -- would it refresh -- would looking at  
11:02:57 3 the grand jury testimony refresh your testimony about  
11:03:00 4 whether a permit was discussed? Did you mention a  
11:03:26 5 permit in the grand jury?

11:03:26 6 A. No.

11:03:28 7 Q. Is lacking a permit an element of the federal  
11:03:32 8 charge, the charge under violation of the U.S. Code?

11:03:35 9 A. No.

11:03:37 10 Q. And in the complaint, you mentioned the  
11:03:40 11 defendant's confession to possessing the gun, am I  
11:03:43 12 correct?

11:03:43 13 A. That he made to Detective Monahan, yes, sir.

11:03:45 14 Q. And you mentioned that same confession in the  
11:03:48 15 grand jury?

11:03:48 16 A. Yes.

11:03:50 17 MR. BARKER: Court's indulgence. No further  
11:03:54 18 questions, Your Honor.

11:03:57 19 THE COURT: You can step down. Thank you.

11:03:59 20 MR. RICHMAN: Would the Court allow any  
11:04:00 21 additional recross just within the area that the  
11:04:03 22 government raised?

11:04:05 23 THE COURT: Was there any new matter?

11:04:08 24 MR. RICHMAN: Well, it had to do with the  
11:04:11 25 scope of the report that they brought up.

11:04:13 1 THE COURT: No. Thank you. You can step  
11:04:15 2 down.

11:04:15 3 (Thereupon, the witness withdrew from the  
11:04:22 4 stand.)

11:04:22 5 MR. BARKER: The government has no further  
11:04:23 6 witnesses at this time.

11:04:24 7 THE COURT: All right.

11:04:35 8 MS. AHMAD: Your Honor, the government would  
11:04:36 9 call Mr. Turner. I'm sorry, the defense will call  
11:04:40 10 Mr. Turner.

11:04:54 11 THEREUPON, SHERMAN ALAN TURNER, having been  
11:05:02 12 duly sworn, testified as follows:

11:05:02 13 THE WITNESS: I do.

11:05:07 14 DIRECT EXAMINATION

11:05:07 15 BY MS. AHMAD:

11:05:15 16 Q. Could you please state your name for the record.

11:05:17 17 A. My name is Sherman Alan Turner.

11:05:20 18 Q. Mr. Turner, I'd like to ask you some questions  
11:05:22 19 about how you came to be arrested on January 9th. Can  
11:05:26 20 you please tell the Court what Officer Freedman told you  
11:05:29 21 to do when she opened the back door of your truck?

11:05:35 22 A. When Officer Freedman approached the truck?

11:05:38 23 Q. Yes.

11:05:42 24 A. She didn't tell me to do anything. What she did  
11:05:45 25 was she opened the door and she seemed as though she was

11:05:53 1 offended by what she saw which was the female that was  
11:05:57 2 with me on the stages of undress.

11:06:03 3 Q. Did she at any point tell you to exit the  
11:06:06 4 vehicle?

11:06:06 5 A. She told me to exit the vehicle after she told  
11:06:12 6 her to get dressed and after she looked into the front  
11:06:16 7 seat of the vehicle.

11:06:19 8 Q. And what did she say to you after she looked into  
11:06:21 9 the front seat of the vehicle?

11:06:23 10 A. What she said was -- well, what she first opened  
11:06:27 11 the door, again, she seemed as though she was appalled  
11:06:32 12 by what she saw or offended by what she saw. And again  
11:06:36 13 it was the female under the stages of undress.

11:06:39 14 And she said, I don't believe this. You have --  
11:06:46 15 I don't believe this. And then she went on to say, I  
11:06:49 16 see you have an open container of alcohol in the  
11:06:52 17 vehicle. What else would I find if I searched, any  
11:06:55 18 marijuana? So I said, Miss, I don't smoke.

11:06:58 19 She shined the light in my eyes. She said, why  
11:07:01 20 your eyes so red and I said I'm tired, I guess.

11:07:06 21 And, she told the lady to get dressed. Put your  
11:07:11 22 hands where I could see them. I put my hands up on  
11:07:16 23 the back seat of the truck. And she looked in the  
11:07:21 24 front. She picked up the alcohol. She picked up the  
11:07:24 25 cigarettes. And then she said I guess this isn't yours

11:07:27 1 either. And she showed me a pack of cigarettes.

11:07:30 2 I said, Miss, I don't smoke for the second time.

11:07:34 3 She turned to the young lady and said, not only does he

11:07:38 4 not -- not only is he going to disrespect you in a

11:07:41 5 public place like this, he has the audacity to pin this

11:07:45 6 on you now. You are some catch, Mister, is what she

11:07:50 7 said to me. I need you to step out of the car and go

11:07:53 8 over there and sit on the curb.

11:07:55 9 Again the lady was getting dressed. I said, Miss

11:07:59 10 I have a prosthetic. I can't sit on the curb. So she

11:08:04 11 said okay, well stand here at the back of the truck. So

11:08:06 12 I stood at the back of the truck.

11:08:10 13 Q. When Officer Freedman asked you is this box of

11:08:14 14 cigarettes not yours either, did she ask the female the

11:08:16 15 same question?

11:08:17 16 A. No.

11:08:17 17 Q. Did she ask the female any questions about the

11:08:20 18 box of cigarettes that contained marijuana?

11:08:22 19 A. No.

11:08:22 20 Q. At any point during the search of your vehicle,

11:08:28 21 did you notice a helicopter in the area?

11:08:30 22 A. Yes. When she first pulled up, she pulled up,

11:08:35 23 she opened the door, she said what she said and then a

11:08:38 24 helicopter flew overhead and he shined the light down

11:08:42 25 and illuminated the park right there.

11:08:46 1 Then when the other cop came, when the other  
11:08:49 2 officer came, the helicopter took off.

11:08:55 3 Q. Now at any point were you handcuffed?

11:09:00 4 A. I was handcuffed after the second officer came I  
11:09:04 5 believe.

11:09:07 6 Q. And when the second officer came, what did he do  
11:09:11 7 with you?

11:09:12 8 A. He escorted me to his cruiser and put me in the  
11:09:16 9 back seat.

11:09:16 10 Q. And you were still handcuffed at that time? Did  
11:09:20 11 he put his hands on you and take you into the cruiser?

11:09:22 12 A. Yes, he assisted me by again I'm -- I don't like  
11:09:28 13 to say disabled. I have limited mobility. I'm not  
11:09:32 14 disabled. I'm not handicapped. I have limited mobility  
11:09:36 15 because I have lost one of my legs.

11:09:41 16 Q. When you were sitting in the back of the police  
11:09:43 17 cruiser, could you see your truck?

11:09:46 18 A. Yes.

11:09:47 19 Q. About how far away were you from your truck when  
11:09:51 20 you were sitting in the back of the cruiser?

11:09:52 21 A. Probably the distance from here to that desk  
11:09:56 22 right there, probably about ten, 12 feet.

11:09:58 23 Q. And, when you say the desk there, you're  
11:10:01 24 referring to the desk that the government's counsel is  
11:10:04 25 sitting at?

11:10:04 1 A. Yes.

11:10:07 2 THE COURT: Pull the mike a little closer to  
11:10:10 3 you if you would. Thanks.

11:10:14 4 BY MS. AHMAD:

11:10:14 5 Q. And were lights still shined on your truck?

11:10:17 6 A. Yes, I think she had the -- she had her high  
11:10:23 7 beams on.

11:10:25 8 When the female officer, Ms. -- I don't know her  
11:10:28 9 name, Ms. Freedman. My truck was backed in. When she  
11:10:32 10 pulled in, she put her lights on the driver's side door.

11:10:37 11 The other officer pulled in and he pulled like  
11:10:40 12 this, catty-corner. So one car was here and one car was  
11:10:45 13 here.

11:10:46 14 Q. So the lights of at least one of those patrol  
11:10:49 15 cars was still shining on your truck?

11:10:51 16 A. The lights of both of the vehicles were shining  
11:10:53 17 on my truck.

11:10:54 18 Q. So you could view the truck pretty clearly?

11:10:56 19 A. Yes.

11:10:57 20 Q. Could you also hear some of the officer's  
11:11:01 21 conversation?

11:11:01 22 A. Not to each other, not Ms. Freedman and the other  
11:11:05 23 officer, the second guy that came.

11:11:10 24 Q. At any point did you see an officer arrive with a  
11:11:13 25 drug sniffing dog?

11:11:15 1 A. Yes, he came after -- after the two officers  
11:11:21 2 searched my vehicle, the dogs came, the canine officer  
11:11:28 3 came and he put the dog in my truck. And the dog went  
11:11:31 4 in the driver side and out the passenger side. So he  
11:11:38 5 grabbed the dog, put him back in and he started patting  
11:11:39 6 here, patting here. To me the dog looked confused and  
11:11:47 7 he went and put the dog away.

11:11:48 8 Q. What happened after the dog was taken away?

11:11:50 9 A. After the dog was taken away, the lady, the  
11:11:53 10 female officer she came over to me, and she said that I  
11:11:57 11 was being -- she said that you're going to be charged  
11:12:01 12 with being in a park after dark, lewd behavior or --  
11:12:06 13 open container of alcohol and marijuana.

11:12:11 14 And I said, Miss, I don't smoke, Miss. And then  
11:12:15 15 the canine officer came back and went to the bed of my  
11:12:18 16 truck, the back tailgate. He opened the tailgate. He  
11:12:24 17 asked me what type of work I do. I'm a licensed  
11:12:27 18 electrician. So I told him I'm an electrician. And he  
11:12:31 19 said, all these tools yours? I said yeah. He said, do  
11:12:35 20 you have a receipt for them? I said, I don't have a  
11:12:37 21 receipt, but they're mine.

11:12:39 22 Then he went from the back of my tailgate, he  
11:12:43 23 shut the tailgate and went to the back seat of my truck.

11:12:48 24 Q. You mentioned that before he went to the  
11:12:52 25 tailgate, the dog had gone through the truck?



11:12:54 1 A. Yes.

11:12:55 2 Q. Did the dog go into the bed of the truck?

11:12:57 3 A. The tail -- the bed, no, no, because I have a --  
11:13:02 4 my tailgate is covered. It's covered and it was closed.  
11:13:06 5 The dog never got into that.

11:13:13 6 Q. So what happened after the canine officer  
11:13:18 7 questioned you about the tools and went to the passenger  
11:13:20 8 part of the truck?

11:13:21 9 A. Then he went into the back seat. I have an  
11:13:24 10 extended cab. It's a four door truck. He went to the  
11:13:27 11 back seat on the passenger side -- on the driver's side.  
11:13:35 12 He went to the back seat. And if you lift the bottom  
11:13:37 13 portion of the seat, then the back portion of the seat  
11:13:40 14 will fall down.

11:13:41 15 So, he lifted that, fold it down, look in the  
11:13:45 16 back. And from where I could see in the police cruiser,  
11:13:49 17 he took the cane out. And I saw him walking back to his  
11:13:53 18 car with my cane.

11:13:55 19 Again, Ms. -- the other lady was standing telling  
11:14:00 20 me what I was going to be charged with. And the officer  
11:14:04 21 came back. He slid the front seat of the passenger side  
11:14:07 22 up. He went to the passenger side, lift the back seat,  
11:14:13 23 slide the front seat up, went under it, then he slide  
11:14:17 24 the driver seat up under it and he called the other  
11:14:20 25 officers back to the truck.

11:14:23 1 Q. And what happened after he called the other  
11:14:26 2 officers back to the truck?

11:14:28 3 A. After they -- after he called the other officers  
11:14:31 4 back to the truck, the female officer came over to me.  
11:14:37 5 I was sitting in the police car. The window was down.  
11:14:40 6 And she said what kind of gun is that?

11:14:49 7 Q. She asked you what kind of gun is that? What was  
11:14:51 8 your response?

11:14:52 9 A. I told her it was a Glock, a Glock 26.

11:14:56 10 Q. Did she ask you any other questions?

11:14:58 11 A. Yes, she asked me -- she said -- and it's yours,  
11:15:04 12 right, because she had already kind of accused me of  
11:15:07 13 trying to put the cigarettes on the girl or whatever.  
11:15:10 14 She said, and this is yours, right? And I say, yeah,  
11:15:15 15 it's mine. And she say, do you have a permit for it? I  
11:15:18 16 say, man, whatever. I just was kind of flippant at that  
11:15:23 17 point because I was mad.

11:15:25 18 Q. Before she came over to the vehicle to ask you  
11:15:28 19 these questions, did you notice a change in the tone at  
11:15:32 20 the scene?

11:15:35 21 A. A change of -- before she asked me those  
11:15:38 22 questions?

11:15:38 23 Q. Yes.

11:15:40 24 A. They were a little bit -- yeah, because she said  
11:15:43 25 something like that, where did you see that or where --

11:15:47 1 the guy obviously called her back and pointed it to her.  
11:15:51 2 The canine officer came back and pointed it to her, and  
11:15:54 3 she said something like how did we miss that or  
11:15:58 4 something to that effect.

11:15:59 5 Q. She didn't say to you. She said that to the  
11:16:02 6 canine officer?

11:16:02 7 A. No, she was talking to them. Again they were  
11:16:06 8 only from here to you away from me and all four doors of  
11:16:09 9 my truck was open and my windows was down in the police  
11:16:12 10 car.

11:16:13 11 Q. So, after she asked you about the gun, she walked  
11:16:16 12 away?

11:16:17 13 A. Yeah, she walked back over to the other officers.  
11:16:24 14 I don't remember who removed it from the -- from the  
11:16:28 15 car. I really don't know who removed it from the car or  
11:16:31 16 from my truck, but the lady came back and asked me. She  
11:16:35 17 said, Mr. Turner, have you ever been convicted of a  
11:16:40 18 felony? And I said yeah, back in 1983-84, like 20 years  
11:16:47 19 ago.

11:16:47 20 And she said okay. And she went over and then it  
11:16:51 21 was -- they were more jubilant like -- I don't know  
11:16:56 22 exactly what they said, but, you know, I can't quote her  
11:17:00 23 verbatim what she said, but it was -- it seemed to me  
11:17:03 24 like they were jubilant.

11:17:06 25 Q. What was it that they did that made you think

11:17:09 1 that they were jubilant?

11:17:10 2 A. Like good catch or like yeah or -- a statement in  
11:17:15 3 reference to that.

11:17:17 4 Q. And, during that questioning, you were still  
11:17:19 5 sitting in the back seat of the cruiser?

11:17:20 6 A. Yes.

11:17:21 7 Q. And your hands were still cuffed?

11:17:23 8 A. Yes.

11:17:23 9 Q. They were cuffed behind your back?

11:17:26 10 A. Yes.

11:17:26 11 Q. And in addition to Officer Freedman, the two  
11:17:29 12 other male officers were still present?

11:17:31 13 A. Yes.

11:17:36 14 Q. When you returned to the police station or --  
11:17:38 15 excuse me. When you were first taken to the police  
11:17:42 16 station, where did they put you?

11:17:43 17 A. They put me in like a booking holding area. It  
11:17:48 18 wasn't in a cell or anything like that. It was just  
11:17:51 19 bench and a booking area.

11:17:54 20 Q. You were sitting on a bench?

11:17:57 21 A. Yes.

11:18:01 22 MS. AHMAD: Court's indulgence.

11:18:22 23 BY MS. AHMAD:

11:18:22 24 Q. While you were sitting in that room, did you see  
11:18:24 25 Officer Freedman at any point?

11:18:26 1 A. The female officer?

11:18:29 2 Q. Yes, the female officer.

11:18:33 3 A. The room was set up if I was sitting here, the  
11:18:36 4 door, the entrance door here. It was like a room. I  
11:18:40 5 don't know what kind of room it was, whether they -- I  
11:18:44 6 would think that's where they stored the weapons or  
11:18:46 7 whatever. I don't really know.

11:18:48 8 Then there was a room directly ahead from me.  
11:18:51 9 And over here, it was a cell.

11:18:53 10 The officer kept -- she came out of here and went  
11:18:56 11 into that room, back and forth. She went a couple of  
11:18:59 12 times, a couple officers did, actually.

11:19:01 13 I don't know if she was -- I don't know what she  
11:19:05 14 was doing.

11:19:05 15 Q. And later a male officer came out to interview  
11:19:08 16 you, correct?

11:19:09 17 A. Yes.

11:19:11 18 Q. And, did that male officer come out of the  
11:19:13 19 same -- did you see that male officer come out of the  
11:19:19 20 same room that the female officer kept walking in and  
11:19:22 21 out of?

11:19:23 22 A. He came out of the main portion of the building I  
11:19:26 23 would say. If I was in booking, whatever -- excuse me,  
11:19:29 24 whatever offices or whatever they do back there is where  
11:19:32 25 he came out of.

11:19:33 1 Q. And, did you ever see the female officer go in  
11:19:36 2 and out of that room?

11:19:38 3 A. Yes.

11:19:40 4 Q. Now, when that male officer interviewed you, he  
11:19:44 5 read you your Miranda rights, correct?

11:19:46 6 A. Yes.

11:19:46 7 Q. And, you waived them and you agreed to answer his  
11:19:50 8 questions?

11:19:50 9 A. Yes, I did.

11:19:51 10 MS. AHMAD: I have no further questions.

11:19:58 11 CROSS-EXAMINATION

11:19:58 12 BY MR. BARKER:

11:20:17 13 Q. When Officer Freedman came to talk to you in the  
11:20:20 14 police cruiser to ask you about the permit, why did you  
11:20:26 15 think she was coming to talk to you?

11:20:28 16 A. Why did I think she was coming to -- she walked  
11:20:31 17 up to the window of the vehicle. She walked up to the  
11:20:36 18 window of the vehicle and she said something to me. She  
11:20:38 19 said, what kind of gun is that.

11:20:40 20 Q. Did she bring the gun with her or leave it in the  
11:20:43 21 truck?

11:20:43 22 A. No, no.

11:20:45 23 Q. And, it's your testimony that you told her that  
11:20:48 24 the gun was yours in response to her questions?

11:20:50 25 A. No, but I told her -- she asked me what kind of

11:20:53 1 gun it was and I said it was a Glock 26.

11:20:56 2 Q. And you knew that because it was your gun?

11:20:58 3 A. I knew that because -- yes.

11:21:03 4 Q. And, did you tell her that you didn't have a  
11:21:06 5 permit for the gun?

11:21:08 6 A. I didn't answer that question at all.

11:21:11 7 Q. You then got dejected or slumped?

11:21:17 8 A. I won't say that. I just say whatever. She  
11:21:19 9 asked me three questions. The first question she asked  
11:21:22 10 me was what kind of gun is that and I told her it was a  
11:21:25 11 Glock 26. I said, it's a Glock, a Glock 26, in that  
11:21:30 12 manner.

11:21:31 13 And then she said, and I guess that isn't yours  
11:21:36 14 either. And so I say yeah, yeah. And then she said is  
11:21:42 15 it registered? Do you have a permit for it? And I  
11:21:45 16 said, man, whatever. And she walked away.

11:21:48 17 Q. And, you were truthful with her throughout that  
11:21:51 18 interaction?

11:21:52 19 A. Yes.

11:21:52 20 Q. So the gun was yours?

11:21:53 21 A. Yes.

11:21:53 22 Q. You possessed it?

11:21:54 23 A. It was in my truck, yes. I possessed it.

11:21:59 24 MS. AHMAD: Your Honor, I would object to  
11:22:01 25 any questions about his ownership of the gun. I do

11:22:04 1 think that questioning about what he said about the gun  
11:22:07 2 at that point is appropriate. But I don't think that  
11:22:10 3 it's necessary in order to answer the questions that are  
11:22:13 4 presented today to talk about whether he actually owned  
11:22:15 5 the gun.

11:22:16 6 MR. BARKER: I think it goes to his  
11:22:18 7 truthfulness, Your Honor.

11:22:19 8 THE COURT: Objection sustained.

11:22:22 9 BY MR. BARKER:

11:22:23 10 Q. Let's turn to your interview at the police  
11:22:25 11 station by Detective Monahan. You said that you told  
11:22:28 12 him you were convicted in what year?

11:22:31 13 A. 1984.

11:22:33 14 Q. What were you convicted of?

11:22:34 15 A. I was convicted of armed robbery.

11:22:39 16 Q. And, you discussed during that interview your job  
11:22:41 17 as an electrician; is that right?

11:22:43 18 A. Yes.

11:22:44 19 Q. You discussed your prior Army service; is that  
11:22:49 20 right?

11:22:49 21 A. Yes.

11:22:49 22 Q. You discussed your prior time in law enforcement;  
11:22:51 23 is that right?

11:22:52 24 A. Yes, brief as it was.

11:22:54 25 Q. You discussed your prosthetic leg for a good



11:22:57 1 deal; is that right?

11:22:58 2 A. He asked me. He questioned me. It wasn't like I  
11:23:01 3 was volunteering this information. He engaged in a  
11:23:05 4 conversation and asked me, how did you lose your leg and  
11:23:07 5 what did you do before you -- you know, like that. It  
11:23:10 6 wasn't like I was just telling him.

11:23:13 7 Q. You discussed that you had children and  
11:23:16 8 stepchildren; is that right?

11:23:17 9 A. Yes.

11:23:19 10 Q. Now, Officer Freedman didn't ask you any  
11:23:21 11 questions after you were Mirandized during that  
11:23:24 12 interview, did she?

11:23:25 13 A. No.

11:23:25 14 Q. And she wasn't in the room, was she?

11:23:27 15 A. I never saw her again. After -- after he took  
11:23:31 16 the cuffs off me and walked me over to the table to  
11:23:36 17 interview me or whatever, I never saw that lady again  
11:23:39 18 until today.

11:23:41 19 Q. Well, with the -- I think no further questions,  
11:23:45 20 Your Honor.

11:23:49 21 MS. AHMAD: Your Honor, I just have one more  
11:23:52 22 question.

11:23:52 23 THE COURT: All right.

11:23:53 24 REDIRECT EXAMINATION

11:23:53 25 BY MS. AHMAD:

11:23:54 1 Q. To the extent that during your interview with the  
11:23:57 2 male officer to the extent that you made statements  
11:24:00 3 about the gun, they were in response to questioning,  
11:24:04 4 right?

11:24:04 5 A. Yes.

11:24:05 6 MS. AHMAD: No further questions.

11:24:09 7 THE COURT: You can step down, sir. Thank  
11:24:11 8 you.

11:24:12 9 (Thereupon, the witness withdrew from the  
11:24:33 10 stand.)

11:24:33 11 MR. RICHMAN: Your Honor, defense rests. We  
11:24:35 12 do have argument.

11:24:36 13 THE COURT: All right.

11:24:41 14 MR. RICHMAN: Your Honor, first of all, with  
11:24:42 15 respect to the facts, we would submit that the Court  
11:24:44 16 should find the following facts.

11:24:47 17 First, that at the roadside when Mr. Turner  
11:24:52 18 was first placed in the back of the police car, that he  
11:24:56 19 was in custody. He was handcuffed with his hands behind  
11:25:04 20 his back and placed in the back of a police cruiser.

11:25:07 21 The test under the cases is whether a  
11:25:11 22 reasonable person would have felt he was not at liberty  
11:25:14 23 to terminate the interrogation and leave. That's from  
11:25:17 24 *Thompson*, a case cited in the briefs.

11:25:20 25 This is not just an ordinary traffic stop

11:25:24 1 where a person is sitting in their own car or even  
11:25:28 2 standing near to their own car being asked a question by  
11:25:32 3 law enforcement.

11:25:32 4 This is the classic straight from the movies  
11:25:35 5 or TV show version of the indicia of being under arrest,  
11:25:43 6 being cuffed with your hands behind your back in the  
11:25:46 7 back of a police cruiser.

11:25:47 8 So, the government cites no cases saying  
11:25:51 9 that that does not constitute custody. We'd submit it's  
11:25:57 10 a clear case of custody. A reasonable person would not  
11:25:59 11 have felt that they could just get up out of that police  
11:26:03 12 car and leave.

11:26:04 13 So, that's the first fact we'd submit the  
11:26:09 14 Court should find that there was custody at that time  
11:26:11 15 when he was cuffed in the back of the police car.

11:26:13 16 The second fact is that when Officer  
11:26:16 17 Freedman asked him -- questioned him and whether that  
11:26:19 18 was one question or multiple questions, that that  
11:26:21 19 constituted interrogation.

11:26:23 20 Again, the test under the cases from *Rhode*  
11:26:26 21 *Island versus Innis* is whether there -- what the officer  
11:26:29 22 did, whether the officer should have known what the  
11:26:34 23 officer did was quote "reasonably likely to elicit an  
11:26:38 24 incriminating response".

11:26:39 25 Now, she said that the purpose of her

11:26:41 1 questioning was because it might make the difference  
11:26:45 2 between a summons and an arrest, for example. That's  
11:26:48 3 really besides the point.

11:26:49 4 The issue is she essentially asked him, even  
11:26:51 5 if you take it just for a question, just a simple  
11:26:54 6 question about a permit, it was whether he was  
11:26:57 7 committing a crime.

11:26:59 8 I mean, that's what she asked. In her view,  
11:27:01 9 it's a crime if you don't have a permit, and she asked  
11:27:04 10 him whether he had one.

11:27:06 11 That was a question are you committing a  
11:27:10 12 crime right now. And she asked that of him while he was  
11:27:13 13 in custody because he was cuffed in the back of the  
11:27:16 14 cruiser.

11:27:16 15 So, we would submit that that constitutes  
11:27:19 16 interrogation and that's true whether you believe her  
11:27:21 17 version of the facts or it's just that one question  
11:27:23 18 about a permit or Mr. Turner's version of the facts  
11:27:26 19 where he says there were at least three questions, what  
11:27:28 20 kind of gun is it? It's yours, isn't it? And, do you  
11:27:33 21 have a permit for it? Those are the three questions  
11:27:35 22 that he says were asked.

11:27:36 23 And as I say it should be found to be  
11:27:41 24 interrogation either way. But I submit the Court should  
11:27:43 25 find Mr. Turner's version of that conversation more

11:27:47 1 credible.

11:27:47 2 First, her version simply doesn't ring true  
11:27:53 3 to me at least that a person -- that an officer walks  
11:27:56 4 up, just asks a six or 7-word question, gets a shrug for  
11:28:01 5 an answer and walks away. There is no other direction  
11:28:04 6 and that's all that occurs. It just doesn't -- doesn't  
11:28:08 7 ring true at least to me.

11:28:09 8 But besides that, he's the person of these  
11:28:13 9 two people who is more likely to remember it accurately.

11:28:17 10 First of all, she said she wasn't even sure,  
11:28:19 11 because she didn't have a report. She wasn't even sure  
11:28:21 12 if that's what the interaction was and she said there  
11:28:23 13 may have been more to it.

11:28:24 14 For her, this is something she does every  
11:28:27 15 day, day in and day out for ten years. And she's  
11:28:29 16 worked, you know, 50 or so shifts since this incident  
11:28:33 17 yet she didn't write anything down about this  
11:28:37 18 questioning at the time. She didn't write it later that  
11:28:39 19 day when she did her affidavit. She didn't talk about  
11:28:41 20 it a couple months after in the grand jury.

11:28:44 21 It didn't come out from her until we had  
11:28:46 22 filed a motion asserting that there was some pre-Miranda  
11:28:49 23 questioning.

11:28:50 24 In light of that, she has nothing to refresh  
11:28:52 25 her recollection. She is just going back to what she

11:28:55 1 now recalls without any way to refresh her recollection  
11:28:58 2 about something she did during a shift several months  
11:29:02 3 ago.

11:29:02 4 For Mr. Turner, of course, it's a key moment  
11:29:05 5 in his life when this is occurring. It's not something  
11:29:09 6 that happens to him every day. He's in the process of  
11:29:11 7 being arrested with severe consequences potentially.

11:29:15 8 So, clearly if there's two people their  
11:29:18 9 recollection of facts isn't directly contradictory. His  
11:29:22 10 just has more meat on it. He's the one that would be  
11:29:24 11 more likely to remember it clearly, and he does have a  
11:29:27 12 clear recollection that there are three questions. What  
11:29:29 13 kind of gun is it, it's yours, and do you have a permit  
11:29:34 14 for it.

11:29:35 15 So in light of that, I would submit that you  
11:29:38 16 should believe his version as to those questions. But,  
11:29:41 17 either way, it's interrogation.

11:29:45 18 And, of course, his version I think is also  
11:29:49 19 more credible in light of the fact that Officer Freedman  
11:29:53 20 did not do anything with respect to Ms. Weeks, the other  
11:29:57 21 individual in -- in regards to asking about the gun.

11:30:02 22 That makes perfect sense if Mr. Turner had  
11:30:05 23 admitted ownership of it, clearly. If he hadn't, well  
11:30:09 24 she just found two people in a vehicle and she found a  
11:30:11 25 weapon in there. It could be either. It could belong

11:30:14 1 to either of them. It simply makes more sense that she  
11:30:18 2 had gotten the clear admission from Mr. Turner that it  
11:30:21 3 was his weapon. And so in light of all that, I submit  
11:30:24 4 that his version of those facts is more likely to be  
11:30:28 5 accurate.

11:30:28 6 The next fact we'd ask the Court to find and  
11:30:32 7 it's not disputed is that Mr. Turner was not Mirandized  
11:30:36 8 during those questions. As I said, that's -- that's not  
11:30:39 9 disputed.

11:30:41 10 And the last fact we ask the Court to find  
11:30:44 11 is -- well the series of facts about the second  
11:30:46 12 interrogation, the one done by Detective Monahan. We  
11:30:50 13 know that that was two hours -- approximately two hours  
11:30:53 14 after the first statement. We know that Mr. Turner was  
11:30:55 15 in continuous custody during the interim. And we know  
11:30:58 16 that Officer Freeman was present at the outset of it.  
11:31:02 17 We know that Mr. Turner was Mirandized by Officer  
11:31:07 18 Monahan.

11:31:07 19 There is no testimony he was told anything  
11:31:11 20 beyond the standard Miranda warnings. In other words,  
11:31:14 21 Officer Monahan as she stood there looking over, didn't  
11:31:17 22 say, hey, your previous statement to me about the gun  
11:31:19 23 can't be used. There's no indication that anything like  
11:31:22 24 that occurred.

11:31:23 25 Rather, we just have him being given the

11:31:25 1 standard Miranda warnings.

11:31:27 2 And, we know that Officer Monahan had been  
11:31:31 3 briefed at least to some extent about what he was doing.  
11:31:34 4 He didn't just sit down with this person and start  
11:31:37 5 talking to him. It goes without saying that obviously  
11:31:40 6 he knew a firearm had been found. He knew that at least  
11:31:42 7 the arresting officer believed it belonged to Mr. Turner  
11:31:45 8 which is why he was interrogating him.

11:31:50 9 And we know that Officer Monahan --  
11:31:57 10 Detective Monahan clearly had been told in one way or  
11:32:01 11 other that based on the investigation at the scene that  
11:32:05 12 it was Mr. Turner's gun because the other individual  
11:32:08 13 wasn't arrested, and Detective Monahan was brought in to  
11:32:11 14 question Mr. Turner about it.

11:32:12 15 So, again, the government didn't present any  
11:32:14 16 evidence as to exactly what Officer Monahan or Detective  
11:32:18 17 Monahan learned because he did not testify.

11:32:20 18 And of course, the government has the burden  
11:32:23 19 of establishing admissibility of its evidence. They'd  
11:32:28 20 just have to put on the testimony of Detective Monahan.  
11:32:32 21 I don't know why they did that. But, we have no idea  
11:32:35 22 what he heard over the radio. We have no idea what he  
11:32:38 23 might have heard from Officer Vinyard. We have no idea  
11:32:40 24 what he may have heard from Officer Daugherty.

11:32:43 25 Any of them may have related to him the fact



11:32:46 1 of the previous statement that I asked the Court to find  
11:32:50 2 was made, the previous un-Mirandized statement, that  
11:32:54 3 being that Mr. Turner admitted ownership of the gun.

11:32:57 4 There is no testimony that he didn't know  
11:32:59 5 about that because there are any number of sources he  
11:33:03 6 could have found it out from and the government chose  
11:33:05 7 not to present his testimony.

11:33:07 8 But, here there is -- what we got is a  
11:33:10 9 sequential interrogation to two different  
11:33:12 10 interrogations. And we need to determine how the Court  
11:33:17 11 should view those.

11:33:18 12 The first one I think is simple. As I said,  
11:33:20 13 all the elements of a classic Miranda violation are  
11:33:23 14 present, custody, interrogation, and lack of Miranda  
11:33:26 15 warning.

11:33:26 16 Now, with respect to that statement, I would  
11:33:32 17 submit the law is crystal clear that anything Mr. Turner  
11:33:35 18 said to Detective Freeman in the back of the police car  
11:33:40 19 has to be suppressed. There's no -- I submit that  
11:33:44 20 that's perfectly clear under Miranda and its progeny.

11:33:48 21 The separate question, the one that is  
11:33:51 22 presented by this motion is what effect does that have  
11:33:54 23 on the statements later made to Detective Monahan?

11:33:56 24 Well, those statements overlap directly with  
11:34:00 25 the key fact in the earlier statement. I mean the key

11:34:04 1 fact here is admission of ownership of the firearm.  
11:34:06 2 It's really -- essentially, there's two elements the  
11:34:09 3 government would need to prove in this offense. One is  
11:34:11 4 that he possessed the firearm. The other is that he had  
11:34:15 5 a felony record. The felony record can be proven by  
11:34:18 6 just looking at the court records.

11:34:19 7 So really, these simple facts, his ownership  
11:34:21 8 and admission of ownership is obviously the key fact  
11:34:23 9 that came out of either set of questioning.

11:34:26 10 So, the two interrogations overlap directly.  
11:34:30 11 There was only -- as I said, there was only two-hour  
11:34:34 12 time gap. He was continuously in custody, and Officer  
11:34:37 13 Freedman was present at the beginning of the second  
11:34:39 14 interrogation.

11:34:40 15 All appearances are that Officer Monahan  
11:34:43 16 knew what had happened up to that point when he began  
11:34:45 17 his interrogation.

11:34:47 18 Now, I submit this is governed entirely by  
11:34:49 19 *Seibert*. Now, the government asked questions and they  
11:34:54 20 seem to be claiming that *Seibert* requires some sort of  
11:35:00 21 Park Police policy to engage in a two-step sequential  
11:35:03 22 interrogation.

11:35:05 23 Now, *Seibert* and the Fourth Circuit in  
11:35:08 24 *Mashburn* do hold that there has to be intent by the  
11:35:13 25 officers to engage in some exploitation of the first

11:35:17 1 statement by means of the second warrant statement.

11:35:21 2           Nothing in *Seibert* says that intent has to  
11:35:24 3 be based on a standing policy of the police department  
11:35:26 4 or it has to start at the roadside.

11:35:28 5           The issue is that Detective Monahan, by the  
11:35:30 6 time he began his questioning, set out to simply get  
11:35:34 7 Mr. Turner to repeat the answer he had already given.

11:35:38 8           And, the circumstances were such that  
11:35:40 9 Mr. Turner, looking at Detective Monahan and seeing  
11:35:43 10 Detective Freedman there, it was clear -- would have  
11:35:47 11 been clear to any reasonable person that Detective  
11:35:50 12 Monahan would have known what he already said.

11:35:51 13           And Officer Freedman stood right there and  
11:35:55 14 watches the Miranda warnings, but nobody says to him, by  
11:35:57 15 the way, what you've already said can't be used. You're  
11:36:00 16 starting on a fresh slate.

11:36:01 17           So, under the circumstances, I would submit  
11:36:03 18 that that second Miranda warning does not cure the  
11:36:09 19 violation.

11:36:10 20           Now, there has been a lot of back and forth  
11:36:14 21 in the briefs about when a second Miranda warning does  
11:36:18 22 and does not cure a previous unwarned statement. And I  
11:36:22 23 just want to set out our position as clearly as I can.

11:36:25 24           There is -- the cases are somewhat confusing  
11:36:32 25 on this point. You've got *Elstad* where it's not even

11:36:38 1 clear that the person was in custody. The only reason  
11:36:41 2 that *Elstad* started on the premise that the person was  
11:36:44 3 in custody it was conceded and not argued in any of the  
11:36:46 4 courts that we can tell. The person was not cuffed and  
11:36:48 5 he was in his living room.

11:36:52 6 Writing on a blank slate, I don't think most  
11:36:54 7 courts find him to be in custody. So the fact that  
11:36:56 8 *Elstad* then becomes this important rule for custodial  
11:37:00 9 interrogation is partially why this gets so confusing in  
11:37:04 10 this theory of law.

11:37:06 11 But in any event, you got two category of  
11:37:08 12 cases set out by *Seibert* on the one hand, by *Elstad* on  
11:37:12 13 the other. *Seibert* involves intentional exploitation --  
11:37:16 14 an intentional use of the second statement to exploit  
11:37:20 15 the first. *Elstad* involves a situation where there's a  
11:37:24 16 good faith Miranda mistake.

11:37:26 17 Now, our position is as I said that *Seibert*  
11:37:29 18 applies because Officer Monahan had the requisite intent  
11:37:32 19 required under *Seibert* to exploit the first statement  
11:37:35 20 and therefore more than a simple Miranda warning was  
11:37:38 21 required. And if it does fit within *Seibert*, the law is  
11:37:41 22 clear that more than just a simple Miranda warning is  
11:37:45 23 required.

11:37:45 24 The government asserts if it doesn't fit  
11:37:50 25 within that test, it has to fit in the other test which

11:37:52 1 is the *Elstad* which says that if you administer Miranda  
11:37:59 2 warning before the second statement, then the second  
11:38:01 3 statement is fine. That's the only question as long as  
11:38:03 4 there's no actual coercion.

11:38:05 5 Now, we submit that's a misreading of  
11:38:10 6 *Elstad*, *Seibert*, and their progeny. The questioning in  
11:38:18 7 the sequential confession case is any case whether the  
11:38:21 8 intervening Miranda warnings can reasonably be found to  
11:38:25 9 be effective.

11:38:26 10 Now, in both *Elstad* and the Fourth Circuit's  
11:38:29 11 case in *Mashburn* which is the follow on case to *Seibert*  
11:38:33 12 from the Fourth Circuit, in both of those cases, you  
11:38:36 13 have what the Courts refer to as objectively reasonable  
11:38:40 14 Miranda violations.

11:38:41 15 In other words, even looking back at it,  
11:38:43 16 it's not clear that the person was in custody. Even if  
11:38:46 17 a Court found later that the person was in custody, it's  
11:38:49 18 not a situation where you can say this is improper  
11:38:52 19 police conduct because it wouldn't have been clear to  
11:38:54 20 the police officer on the scene that the person was in  
11:38:57 21 custody, and therefore, the time rule of Miranda and the  
11:39:02 22 rule of suppression don't further any particular purpose  
11:39:08 23 in deferring police conduct.

11:39:10 24 And *Elstad* specifically says that and  
11:39:12 25 *Seibert* specifically says that the exclusionary rule

11:39:15 1 relating to Miranda violation, one of the purposes of it  
11:39:17 2 is to deter police misconduct.

11:39:19 3 And that's why in a case like *Elstad* where  
11:39:25 4 the original violation was objectively reasonable, all  
11:39:28 5 you need is a midstream recitation of Miranda because as  
11:39:33 6 long as you give Miranda before the second statement  
11:39:37 7 using the exclusionary rule to exclude the second  
11:39:41 8 statement isn't going to deter police misconduct because  
11:39:43 9 there was no improper conduct in the first place.

11:39:46 10 It was mistaken understandably even by the  
11:39:49 11 courts. Looking back at it in this case, we would say  
11:39:53 12 do we have a classic Miranda violation, a situation  
11:39:55 13 where any police officer on the roadside should know not  
11:39:58 14 to ask a question that's going to elicit an  
11:40:01 15 incriminating response like did you submit a crime?  
11:40:05 16 Because he's cuffed and in the back of a car, and she  
11:40:09 17 did that.

11:40:10 18 So, whether that's intentional or by  
11:40:13 19 mistake, either way, it's objectively unreasonable.  
11:40:16 20 It's a classic Miranda violation that a police officer  
11:40:19 21 should not do.

11:40:20 22 And, in that case, we would submit that the  
11:40:24 23 goals of the exclusionary rule set forth in *Elstad*,  
11:40:32 24 *Seibert*, all of them talk of the goal of stopping  
11:40:37 25 improper police conduct. And, we would say that that

11:40:40 1 would apply here.

11:40:41 2 The exclusionary rule relating to the second  
11:40:44 3 state would apply because it would deter that first  
11:40:48 4 getting the unwarned statement by the roadside. It  
11:40:51 5 would deter that improper police conduct and that's  
11:40:54 6 true, as I said whether it was intentional or mistaken.

11:40:58 7 But in any event, what we're simply  
11:41:08 8 proposing is that where you have a classic Miranda  
11:41:12 9 violation and then a second warnings statement, the  
11:41:15 10 Court needs to look at all the circumstances to  
11:41:17 11 determine whether simply reciting the Miranda warnings  
11:41:22 12 was sufficient to render the second statement voluntary.

11:41:25 13 We'd submit here it wasn't. The second  
11:41:27 14 statement was simply a continuation of the first.  
11:41:29 15 Officer Freeman was present at both. Mr. Turner was in  
11:41:32 16 continuous custody in between. There was only a  
11:41:36 17 two-hour gap.

11:41:37 18 Officer Freeman did not tell him that the  
11:41:40 19 previous statement can't be used. The obvious import to  
11:41:44 20 Mr. Turner of this situation was that Detective Monahan  
11:41:47 21 knew of the earlier statements.

11:41:48 22 And in these circumstances, a simple  
11:41:50 23 recitation of Miranda before the second interrogation is  
11:41:53 24 not sufficient because the second interrogation is just  
11:41:57 25 a continuation of the first.

11:41:58 1 So, the second set of questions and the  
11:42:02 2 second set of answers are not voluntarily given  
11:42:05 3 following a knowing waiver because Mr. Turner is simply  
11:42:07 4 sitting there believing that he's already given them all  
11:42:10 5 the information they want.

11:42:11 6 And I would point out there's a case that  
11:42:14 7 cited in the government's sur-reply, *U.S. versus Stewart*  
11:42:19 8 which is a Seventh Circuit case from 2008.

11:42:23 9 In that case, the Court did -- the  
11:42:27 10 government cites it, but upon reading it, I believe that  
11:42:30 11 Your Honor would see the Court did exactly what we are  
11:42:32 12 asking the Court to do which is the Court looked at  
11:42:38 13 whether -- and I'm referring to page 722. It's 536 F3d,  
11:42:45 14 722.

11:42:46 15 When the officer took the second statement  
11:42:48 16 in that case, I believe it was the same officer, but  
11:42:50 17 before he took the second statement, the question was  
11:42:53 18 had his prior failure to Mirandize been in good faith?

11:42:58 19 That's exactly what the Court looked at.  
11:43:00 20 And finding there that there was a good faith  
11:43:03 21 understandable explanation for his failure to give the  
11:43:06 22 original Miranda warnings, the Court said then *Elstad*  
11:43:11 23 and simply giving Miranda warnings is a sufficient cure.

11:43:13 24 So, that's post *Seibert* and post -- in post  
11:43:18 25 all the Supreme Court cases on this area. The Seventh



11:43:21 1 Circuit is looking at it using exactly the test we're  
11:43:23 2 using. And in that case they said since there's a good  
11:43:27 3 faith understandably reason why the first set of Miranda  
11:43:31 4 warnings weren't given, then we're just going to apply  
11:43:33 5 *Elstad* and say a midstream recitation of Miranda is  
11:43:38 6 sufficient.

11:43:39 7 Here I would submit the Court should reach  
11:43:40 8 the opposite result. There is no good faith reason. So  
11:43:41 9 the Court should apply a more searching inquiry as to  
11:43:44 10 whether the second statement was voluntarily given.

11:43:55 11 And just -- Your Honor, again, it is the  
11:43:57 12 government's burden. They're the ones who chose not to  
11:44:00 13 present Officer Monahan and could have enlightened the  
11:44:02 14 Court as to exactly what he did know and what his intent  
11:44:06 15 was when he took the second statement.

11:44:07 16 THE COURT: All right.

11:44:12 17 MR. BARKER: I'd like to also begin with the  
11:44:17 18 factual findings that we believe the Court should make.  
11:44:24 19 We believe the Court should credit Officer Freedman's  
11:44:27 20 testimony over the defendant's.

11:44:29 21 She explained in detail why she didn't ask  
11:44:33 22 more questions after asking him about the permit, and  
11:44:35 23 that's because she was concerned about Miranda.

11:44:37 24 And as defense counsel drew out in his  
11:44:40 25 cross-examination, she has been an officer for a while

11:44:42 1 and she understands Miranda requirements.

11:44:44 2 And indeed, if this was so clear a situation  
11:44:46 3 as to require the warnings as defendant suggest, it's  
11:44:49 4 likely that, you know, she would have given the  
11:44:53 5 warnings. The fact that she didn't suggest is one  
11:44:55 6 additional fact the Court should consider in crediting  
11:44:58 7 her testimony over the defendants.

11:45:00 8 As to why it wasn't in the police report,  
11:45:03 9 Officer Freedman explained. She didn't think it was  
11:45:05 10 material, and I think that's very reasonable given that  
11:45:07 11 there was a confession in the interview that was  
11:45:11 12 memorialized in her report.

11:45:13 13 You know, it didn't become material until  
11:45:16 14 the suppression motion happened. And I think it's  
11:45:20 15 also -- the defense points out that this was an  
11:45:24 16 important event for the defendant and he is therefore  
11:45:27 17 more likely to accurately recall things.

11:45:29 18 You know, you heard Officer Freedman testify  
11:45:31 19 that there are aspects she didn't recall. But you also  
11:45:34 20 heard specifics about where it was, when it was, what  
11:45:37 21 was found, the car, the windows were up, opening the  
11:45:40 22 door, that sort of thing.

11:45:42 23 So, it's not correct to suggest that she is  
11:45:45 24 just completely at a loss. And then, I'd also point out  
11:45:48 25 that the defendant, of course, has self interest in the

11:45:51 1 factual findings.

11:45:53 2 As for why Officer Freedman, you know,  
11:45:59 3 approached the defendant and asked him about the permit,  
11:46:01 4 she testified she concluded it was his because it was  
11:46:05 5 found next to the driver's seat of his truck consistent  
11:46:08 6 with him putting it there. And I think that's a pretty  
11:46:11 7 reasonable assumption.

11:46:12 8 And indeed under the defendant's version of  
11:46:14 9 facts, not convicted by Officer Freedman, she had been  
11:46:17 10 focusing on him since the beginning, starting with the  
11:46:21 11 marijuana. So I think it's consistent that she  
11:46:23 12 approached him and asked him about the permit because  
11:46:25 13 she had concluded it was his, not because he had already  
11:46:28 14 told her in response to the question that it was his.

11:46:31 15 At the station house, defendant stated he  
11:46:37 16 didn't believe that Officer Freedman was present during  
11:46:40 17 the interview. And I mean, I think that's consistent  
11:46:45 18 with her testimony which is that she watched the  
11:46:47 19 Mirandizing through the window into the interview room  
11:46:50 20 and after that wasn't in the room.

11:46:52 21 As to why Detective Monahan didn't testify,  
11:46:56 22 we didn't call him because we think it would be  
11:46:58 23 cumulative given what the defendant already said.

11:47:01 24 And the issue here is not -- I mean, the  
11:47:05 25 issue here is two things. Were Miranda warnings

11:47:11 1 required at the time of the stop of the interaction  
11:47:13 2 between Officer Freedman and the defendant?

11:47:15 3 And then secondly, if they were and given  
11:47:18 4 that they weren't given in this case, does the *Seibert*  
11:47:25 5 exception apply given that the defendant was Mirandized  
11:47:27 6 at the station house and waived?

11:47:29 7 Now, we already have testimony that the  
11:47:31 8 defendant was administered the Miranda warnings at the  
11:47:34 9 station house, that he waived those. And as we said in  
11:47:36 10 our response, it's not disputed that those warnings and  
11:47:39 11 waiver were voluntarily, that the statement was  
11:47:41 12 voluntary. And it's not disputed that his statement at  
11:47:44 13 the scene that he didn't have a permit was voluntary.

11:47:47 14 The question is whether Miranda warnings  
11:47:49 15 were required. And so, we don't feel that Officer --  
11:47:53 16 Detective Monahan could shed light on the fact in  
11:47:56 17 dispute.

11:47:56 18 I mean, I guess they're right. We could  
11:47:59 19 have confirmed Officer Freedman's testimony that she  
11:48:04 20 didn't tell him about those, you know, the statement the  
11:48:07 21 defendant made about not having a permit.

11:48:09 22 So, I guess I would agree to that extent.  
11:48:10 23 But that would just be cumulative in our view. And to  
11:48:13 24 suggest that he could have heard it from other means I  
11:48:16 25 think is just speculation not supported by any fact

11:48:20 1 evidence.

11:48:20 2 As for *Elstad*, we're not suggesting that  
11:48:25 3 there has to be a Park Police policy allowing --  
11:48:29 4 requiring question first, interrogation to trigger the  
11:48:33 5 *Seibert* exception. The test is as Justice Kennedy  
11:48:38 6 stated it in *Seibert* and as quoted in our brief.

11:48:41 7 But the fact of a lack of a policy, the lack  
11:48:42 8 of a practice and the lack of intent to use that  
11:48:45 9 strategy that night is certainly pertinent evidence as  
11:48:49 10 to the *Seibert* standard which is whether the law  
11:48:53 11 enforcement deliberately withheld the Miranda warnings  
11:48:55 12 at the scene in an effort to undermine Miranda by  
11:48:58 13 suppressing its value later at the time of the custodial  
11:49:03 14 interrogation.

11:49:04 15 And Officer Freedman testified that it  
11:49:07 16 wasn't her intent. She wasn't even thinking ahead to  
11:49:09 17 the interrogation at the station.

11:49:12 18 And I think under that standard the facts  
11:49:16 19 that -- there's no policy and no practice of it is  
11:49:19 20 certainly very probative evidence.

11:49:21 21 As for the fact of this -- I think even  
11:49:29 22 under the defense's view of the case which is that the  
11:49:33 23 defendant was asked at the scene about the ownership of  
11:49:37 24 the gun, I think even then it's not the case that the  
11:49:42 25 *Elstad* rule is undermined by *Seibert* here because

11:49:47 1 essentially what we have is, yes, the questioning at  
11:49:50 2 this station was the same, but there was no choice --  
11:49:54 3 there's no deliberate strategy to undermine the Miranda  
11:50:00 4 warnings.

11:50:00 5 Even under those circumstances, I don't  
11:50:03 6 think -- I think it's reasonable for Officer Freedman to  
11:50:06 7 think that the defendant has not been arrested.

11:50:09 8 Yes, he's clearly by seized according to the  
11:50:14 9 Fourth Amendment standards. His liberty is restricted.  
11:50:17 10 But, I think the case law is clear and the Supreme Court  
11:50:18 11 made this point in *Berkemer versus McCarty* that a  
11:50:20 12 seizure for Fourth Amendment purposes is not the same as  
11:50:24 13 a custody for Miranda purposes.

11:50:25 14 And I think it's reasonable for her to think  
11:50:27 15 that, but especially on the facts as we think are most  
11:50:31 16 credible, the fact that she asked him about the permit  
11:50:33 17 and didn't stopped there because she was cognizant of  
11:50:36 18 her Miranda violations. It was firmly reasonable for  
11:50:39 19 her to conclude that Miranda warnings aren't required  
11:50:42 20 for that single question.

11:50:43 21 She had -- she testified to her reason for  
11:50:46 22 asking it, that she was -- she had dealt with the issue  
11:50:49 23 in the past where a permit made the difference between  
11:50:52 24 prosecution with the U.S. Attorney's Office or not and  
11:50:54 25 would have determined the arrest.

11:50:59 1 She testified that, you know, she had the  
11:51:00 2 defendant and Ms. Weeks put in the car for security  
11:51:03 3 purposes and for -- to keep them from the cold.

11:51:08 4 And, you know, I think those are reasons  
11:51:10 5 that any reasonable officer at the scene would not make  
11:51:13 6 them think that there's custody for Miranda purposes.

11:51:17 7 And, you know, I think typically officers  
11:51:21 8 want to have the Miranda warnings done in a more  
11:51:25 9 controlled setting where there's a card they can read  
11:51:27 10 from and have the signature.

11:51:29 11 And so, I don't think there's any evidence  
11:51:32 12 here that would suggest that the *Seibert* exception is  
11:51:36 13 triggered.

11:51:37 14 As for the defendant's argument that there  
11:51:40 15 should be a test of whether the Miranda warnings were  
11:51:44 16 reasonably found to be effective, I think the answer to  
11:51:47 17 that is that's the position of the plurality opinion in  
11:51:51 18 *Seibert*, but not Justice Kennedy's opinion.

11:51:55 19 And I think the majority of the Court in  
11:51:56 20 *Seibert* rejected that. Justice Kennedy rejected that  
11:52:01 21 test by adopting his narrow test. And the four  
11:52:06 22 dissenting judges rejected that by rejecting the  
11:52:07 23 exception to *Elstad* altogether.

11:52:08 24 And I think that's what the Seventh Circuit  
11:52:10 25 case that we quoted at length in our brief recognizes as

11:52:13 1 well as the other cases cited in the Fourth Circuit  
11:52:16 2 *Mashburn* opinion and agreeing with that *Seibert* opinion  
11:52:20 3 test.

11:52:20 4 And I think it's pretty clear from the Court  
11:52:22 5 and the passage in our brief and that's why we set it  
11:52:25 6 out at length that under -- the *Stewart* passage -- about  
11:52:32 7 *Seibert* that the test if there's not the deliberate  
11:52:38 8 undermining of Miranda with the question-first technique  
11:52:41 9 and this is at page seven of our sur-reply is the simple  
11:52:46 10 voluntariness inquiry of *Elstad*. And that is, the  
11:52:49 11 inquiry into this unMirandized statement was voluntary  
11:52:52 12 or not coerced which again there's not been a dispute  
11:52:56 13 about that and whether the second statement obtained  
11:52:59 14 after the warnings was, in fact, obtained in compliance  
11:53:04 15 with Miranda and was it self-voluntary under the Fifth  
11:53:09 16 Amendment.

11:53:09 17 As for the argument that -- and this is  
11:53:13 18 actually the same argument. They're saying, well, even  
11:53:15 19 if there wasn't a deliberate effort to undermine Miranda  
11:53:19 20 by using the question-first technique, *Elstad* itself  
11:53:23 21 dealt with good faith mistakes and shouldn't be read to  
11:53:27 22 a case such as this.

11:53:29 23 I guess I'm not exactly clear on their  
11:53:31 24 proposed standard whether it is a subjective test or  
11:53:34 25 whether the officer had a belief Miranda warnings were



11:53:38 1 required or whether it's an objective test about whether  
11:53:42 2 it would be reasonable to think they're required or  
11:53:45 3 whether it's some alternative test about the clarity of  
11:53:48 4 the need for the warnings.

11:53:49 5 I think Mr. Richman said at one point that  
11:53:52 6 even if it's by mistake, their failure to give warnings  
11:53:57 7 is by mistake that *Elstad* should -- I have written down  
11:54:01 8 quote, "whether intentional or by mistake", end quote,  
11:54:06 9 that if it was objectively unreasonable not to give the  
11:54:10 10 warnings, there should be exclusion.

11:54:11 11 Well, you know, I think that runs counter to  
11:54:15 12 the policy of *Elstad* to say that an officer made a  
11:54:18 13 mistake about not giving a warning, but the mistake was  
11:54:24 14 objectively unreasonable and therefore a later warning,  
11:54:27 15 complete warning is ineffective flies in the face of  
11:54:30 16 *Elstad* which was designed to put a bright line rule out  
11:54:35 17 there and say if Miranda warnings aren't given initially  
11:54:40 18 and, you know, there's an interrogation later that is  
11:54:44 19 Mirandized, the later Miranda warning are effective.

11:54:47 20 And I think the Court was pretty clear in  
11:54:49 21 *Elstad* that the reason for that is that officers needed  
11:54:51 22 to be able to rely on the words of the warning as being  
11:54:54 23 effective.

11:54:55 24 And we don't go about second guessing the  
11:54:57 25 psychological effects of earlier statements on the words

11:55:02 1 of the warning.

11:55:02 2 And I think Justice Kennedy is clear about  
11:55:04 3 that in his concurrence in *Seibert* where he talks about  
11:55:07 4 the clarity of the settled Miranda law and the need for  
11:55:11 5 a very limited exception to it. That's why he rejects  
11:55:14 6 the plurality test which is the sort of gauging the  
11:55:17 7 effectiveness of the Miranda warning under multifactor  
11:55:22 8 test.

11:55:23 9 And I don't think that respects the policies  
11:55:26 10 of *Elstad*, and I think that's settled.

11:55:29 11 As, you know -- I was researching -- I guess  
11:55:36 12 I won't get into that.

11:55:38 13 But even if I guess we accept the defense  
11:55:40 14 position that there is this multifactor test into  
11:55:44 15 effectiveness, I know the defense sort of disparages the  
11:55:51 16 gap in time here saying only two hours.

11:55:52 17 But I would note some of the cases cited in  
11:55:55 18 our brief, and I think this is in our response brief  
11:55:58 19 near the end. I'm going to say page 13 to 14 involved  
11:56:05 20 gaps of less than that, that were found to be enough of  
11:56:09 21 a gap.

11:56:09 22 The *Sweets* case I just looked up, I have  
11:56:11 23 here with me was an 80-minute gap. And that's cited at  
11:56:16 24 the bottom of page 13.

11:56:17 25 And I think some of the others had gaps

11:56:19 1 along the same lines.

11:56:20 2 And this test is further different from  
11:56:22 3 *Seibert* on the other factors. In *Seibert* the officer  
11:56:25 4 who continued the Mirandizing in the interrogation was  
11:56:29 5 the same officer who conducted the unMirandized  
11:56:32 6 interrogation.

11:56:33 7 That was not the test here. And of course,  
11:56:35 8 Officer Freedman was at the station, and she may have  
11:56:38 9 walked into the room. I don't -- I haven't actually  
11:56:40 10 asked her about whether she walked through before the  
11:56:42 11 interrogation. But she testified that she wasn't there  
11:56:45 12 during the interrogation, and she didn't ask any  
11:56:48 13 questions and the defendant agreed with that.

11:56:50 14 It's a different officer, different location  
11:56:53 15 from Belle Haven up to the District Two Police Station.  
11:56:59 16 The gap in time of the two hours and, you know, I think  
11:57:04 17 those factors clearly distinguish this from *Seibert* as  
11:57:07 18 well.

11:57:11 19 And again, I think I would just fall back on  
11:57:13 20 the policy of the *Elstad* decision which is that you  
11:57:17 21 know, it recognizes that I suppose inherent in every  
11:57:21 22 instance of police questioning, there is some -- some  
11:57:24 23 perhaps coercive aspect just from the fact that one is  
11:57:28 24 talking to a police officer who represents the  
11:57:30 25 possibility of charges.

11:57:31 1 But the *Elstad* Court's decision stood for  
11:57:34 2 the principle that we're not going to endow with  
11:57:38 3 constitutional significance whatever presumed  
11:57:42 4 psychological effect there might be from an earlier  
11:57:44 5 Mirandized statement.

11:57:45 6 When there are Miranda warnings, the Court  
11:57:47 7 said in *Elstad* that the Miranda warnings themselves  
11:57:50 8 contain the words that are sufficient to put a defendant  
11:57:51 9 on notice.

11:57:54 10 This is not the defendant's first  
11:57:55 11 interaction with the law. I think that brings things  
11:57:57 12 all the more true here.

11:57:58 13 So, you know, I think we'd rest on our  
11:58:02 14 briefs for the more nuances, a doctrinal analysis of  
11:58:05 15 those case, but I think I've been able to sort of  
11:58:08 16 summarize the policy directives that we see underline  
11:58:11 17 those cases that justify rejecting the proposed reading  
11:58:14 18 that the defense has offered here.

11:58:16 19 We believe that's been rejected by the  
11:58:18 20 Supreme Court and by the Fourth Circuit already and  
11:58:21 21 other circuits as well as noted in our briefs.

11:58:23 22 THE COURT: Thank you.

11:58:29 23 MR. RICHMAN: Your Honor, I'll be very  
11:58:32 24 brief.

11:58:32 25 Your Honor, the government has talked a lot

11:58:34 1 about the subjective intent of Officer Freedman. This  
11:58:36 2 case doesn't turn at all on the subjective intent of  
11:58:39 3 Officer Freedman. It turns on the subjective intent of  
11:58:43 4 Officer Monahan.

11:58:45 5 The Court -- the government had the burden  
11:58:50 6 and did not present Detective Monahan.

11:58:54 7 Here as I said before, there was Miranda  
11:58:57 8 violation. In fact we say it was a classic Miranda  
11:58:59 9 violation because it was objectively unreasonable for  
11:59:01 10 her to ask that question or those questions without  
11:59:04 11 Mirandizing him based on clearly settled law.

11:59:06 12 So, again it doesn't turn on her subjective  
11:59:09 13 intent. It turns on an objective analysis of whether it  
11:59:12 14 was clear that he should have been Mirandized. We  
11:59:14 15 submit that it was clear.

11:59:15 16 Now the question then becomes in which  
11:59:21 17 category does this case fit? Does it fit in *Seibert*?  
11:59:25 18 We submit that it does because by the time of Detective  
11:59:29 19 Monahan's interrogation, we submit that the Court should  
11:59:32 20 find that he did have the necessary intent to exploit  
11:59:36 21 the prior statement and to essentially overbear the  
11:59:41 22 person's belief that he could remain silent without  
11:59:46 23 incriminating himself.

11:59:47 24 So, in those circumstances, *Seibert* held  
11:59:49 25 that a simple giving of second Miranda -- first set of

11:59:53 1 Miranda warnings before the second interrogation,  
11:59:55 2 *Seibert* held is insufficient and that's why *Seibert*  
11:59:59 3 suppressed that second sequential interrogation.

12:00:03 4 Even if *Seibert* does not apply and the Court  
12:00:07 5 doesn't find that Officer Monahan's intent was akin to  
12:00:08 6 the intent of the officers in *Seibert*, we submit that  
12:00:09 7 this is still governed by a test as yet not entirely  
12:00:14 8 clarified by the Supreme Court.

12:00:16 9 *Seibert* has characterized *Elstad* as applying  
12:00:20 10 the good faith mistakes in failing to Mirandize. We  
12:00:25 11 submit this was not such a case. This was a classic  
12:00:27 12 Miranda violation.

12:00:28 13 And when a classic Miranda violation occurs,  
12:00:31 14 the Supreme Court has not been clear as to whether a  
12:00:34 15 simple recitation of Miranda warnings before the second  
12:00:38 16 statement is sufficient.

12:00:39 17 We submit that it's not in these  
12:00:42 18 circumstances. Mr. Turner -- an objective person in  
12:00:45 19 Mr. Turner's position would not have felt remaining  
12:00:48 20 silent would have simply protected himself from self  
12:00:51 21 incrimination.

12:00:52 22 Therefore, his second set of statements  
12:00:55 23 because he wasn't given any additional curative warnings  
12:00:58 24 is not voluntary and should be suppressed.

12:01:01 25 And so we submit that the Court -- if there

12:01:04 1 is a classic Miranda violation in the first instance,  
12:01:07 2 the Court has to do a more searching inquiry as to all  
12:01:10 3 the facts and circumstances of the second to determine  
12:01:13 4 whether it's voluntary. Here we submit that it wasn't.

12:01:16 5 Now, the government just to mention one  
12:01:18 6 case, the government brought up the *Sweets* case, a case  
12:01:20 7 by Judge Nehemiah where there were two statements  
12:01:24 8 80 minutes apart.

12:01:25 9 In that case, the second statement wasn't  
12:01:26 10 the same as the first. It was on a different topic. So  
12:01:30 11 it's a significantly different situation than we have  
12:01:32 12 here where there is direct overlap of the single key  
12:01:36 13 fact.

12:01:36 14 THE COURT: All right, thank you.

12:01:37 15 We'll take the morning recess now for about  
12:01:39 16 15 minutes.

12:01:53 17 (Court recessed at 12:07 and reconvened at  
12:18:47 18 12:18 p.m.)

12:18:47 19 THE COURT: All right, let the record  
12:18:48 20 reflect this is the matter of United States of America  
12:18:51 21 versus Sherman Alan Turner.

12:18:53 22 This matter is before the Court on the  
12:18:55 23 defendant's motion to suppress statements allegedly made  
12:18:57 24 to Officer Freedman and Detective Monahan in connection  
12:19:00 25 with his arrest in January of 2009.

12:19:05 1 The following are the findings of fact and  
12:19:07 2 conclusion of law, the Court having had an opportunity  
12:19:09 3 to observe the witnesses, to consider their testimony,  
12:19:12 4 to consider their demeanor and to weigh the credibility  
12:19:14 5 of the witnesses.

12:19:16 6 At the outset, this is a case involving a  
12:19:21 7 legal question. And that legal question has to do with  
12:19:24 8 whether or not the statements allegedly made by  
12:19:28 9 Mr. Turner to Officer Freedman at the scene when he was  
12:19:33 10 encountered by Officer Freedman and he was in a police  
12:19:37 11 car, whether that statement which was allegedly made  
12:19:41 12 concerning whether or not he had a permit for a gun was  
12:19:44 13 involuntary because it was made without the officer  
12:19:49 14 giving Mr. Turner his Miranda warnings, whether such a  
12:19:54 15 statement would be admissible under Miranda and whether  
12:19:59 16 those initial unwarned statements rendered involuntary  
12:20:03 17 the statements the defendant allegedly made after  
12:20:07 18 receiving a Miranda warning and waiving those rights  
12:20:10 19 from Detective Monahan at the police station.

12:20:12 20 The evidence from Officer Lynda Turner  
12:20:17 21 (sic), United States Park Police was on January 9, 2009  
12:20:20 22 that she was on patrol on GW Parkway. She drove into  
12:20:26 23 Belle Haven parking lot approximately quarter to one,  
12:20:30 24 meaning 1 a.m.

12:20:31 25 The park was closed, and of the three



12:20:35 1 parking lots the defendant's Silverado four-door truck  
12:20:39 2 was parked in the furthest away parking lot facing into  
12:20:43 3 the -- away from the river, facing in toward the parking  
12:20:44 4 lot.

12:20:45 5 She drove up. She shined her spotlight on  
12:20:47 6 the truck and she saw two people inside the truck who  
12:20:51 7 were moving around apparently in a state of unrobed who  
12:20:54 8 were trying to get their clothes on.

12:20:56 9 She went to the passenger side of the truck,  
12:21:01 10 shined her light, and she opened the door and she saw a  
12:21:04 11 female in the back with the defendant in the back who  
12:21:07 12 was naked.

12:21:08 13 She opened the door and she said that she  
12:21:11 14 was opening the door and just before that she saw the  
12:21:13 15 defendant move in the back of the truck. And so when  
12:21:17 16 she opened the door, Officer Freedman said that smoke  
12:21:22 17 came out and it smelled to her like the smoke that she  
12:21:26 18 associates with marijuana.

12:21:28 19 There was some conversation with the two  
12:21:30 20 occupants where she asked them to get dressed and to  
12:21:35 21 provide some identification. And the two persons did  
12:21:40 22 get dressed. And she had them come out of vehicle and  
12:21:44 23 she looked inside. And I infer that she had the  
12:21:47 24 driver's license in her hand at that time.

12:21:49 25 And she decided to look in to see if there

12:21:53 1 was any weapon or other contraband. And in the center  
12:21:56 2 console she saw a Newport cigarette pack. And when she  
12:22:01 3 looked in the Newport cigarette pack, she saw what she  
12:22:05 4 detected to be marijuana cigarettes.

12:22:09 5 She handcuffed the defendant and she had  
12:22:11 6 Ms. Weeks, the person who was identified -- the female  
12:22:13 7 identified as Ms. Weeks to sit on the curb.

12:22:16 8 She asked the defendant to do so, and he  
12:22:18 9 told her that he had a prosthetic and therefore could  
12:22:21 10 not sit on the curb. And so she asked him to stand or  
12:22:24 11 sit near the rear of the truck.

12:22:26 12 She called for backup and apparently a  
12:22:28 13 helicopter had come over this area as well and was  
12:22:31 14 shining a light on this whole area.

12:22:33 15 The second officer to arrive according to  
12:22:36 16 Officer Freedman was Officer Vinyard who when he arrived  
12:22:41 17 at that point she had, Officer Vinyard put the defendant  
12:22:46 18 in handcuffs.

12:22:47 19 The defendant -- she had already put the  
12:22:49 20 defendant in handcuffs. She had Officer Vinyard put the  
12:22:53 21 defendant in Officer Vinyard's cruiser. And Ms. Weeks  
12:22:58 22 was put into Officer Freedman's cruiser. This was to  
12:23:01 23 keep them separate.

12:23:02 24 And according to Officer Freedman she had  
12:23:05 25 not yet decided whether or not to arrest the defendant

12:23:07 1 or Ms. Weeks at that point and testified that there are  
12:23:11 2 times when individuals are encountered on the Parkway in  
12:23:15 3 parking lots were not charged with marijuana offenses.

12:23:19 4 Later Officer Daugherty arrived with a drug  
12:23:23 5 dog and she told Officer Daugherty about finding the  
12:23:27 6 marijuana and the dog was put through the vehicle.

12:23:29 7 She searched the truck with Officer  
12:23:33 8 Freedman -- Vinyard. I'm sorry, Officer Freedman and  
12:23:36 9 Officer Vinyard searched the truck. And according to  
12:23:41 10 Officer Freedman, Officer Vinyard observed the handle of  
12:23:43 11 a gun and she then recovered it from the back seat.

12:23:48 12 Officer Freedman testified that thereafter  
12:23:52 13 there came a point when she went over to the police car,  
12:23:58 14 Officer Vinyard's police car where the defendant was  
12:24:01 15 seated and she opened the door and asked him do you have  
12:24:04 16 a permit for the weapon.

12:24:07 17 And according to her, the defendant said no,  
12:24:10 18 not sure. He didn't make a statement. She was not  
12:24:13 19 clear what he said, but she interpreted his actions to  
12:24:16 20 suggest that he had a gun and he knew he should not have  
12:24:23 21 a gun.

12:24:24 22 She did not give the defendant any Miranda  
12:24:26 23 warning at that point. And she says that she had not  
12:24:29 24 decided whether or not he was under arrest.

12:24:31 25 Obviously, there came a point it seems to me

12:24:34 1 that once she went back to the car with the gun, she had  
12:24:38 2 an idea in her mind that the gun belonged to the  
12:24:41 3 defendant. I'm not sure how she decided it was the  
12:24:43 4 defendant as opposed to Ms. Weeks, except her testimony  
12:24:46 5 that it was besides the driver's side in a position that  
12:24:50 6 would be easy for a right-handed driver to pull it out,  
12:24:54 7 does seem to have some merit.

12:24:56 8 And, she had said at that point that she  
12:25:01 9 knew the defendant was going to be arrested. She had  
12:25:04 10 not told him what he was under arrest for, but he was  
12:25:07 11 definitely going to be arrested.

12:25:09 12 She indicated that at that point that she  
12:25:12 13 had no plan necessarily to have Detective Monahan  
12:25:18 14 question the defendant at the police station. And she  
12:25:24 15 did describe to the defendant approximately at 1:15 or  
12:25:29 16 1:30 that he was under arrest and that she was going to  
12:25:32 17 arrange for his vehicle to be taken away.

12:25:35 18 And she, Officer Freeman waited at the scene  
12:25:38 19 with Ms. Weeks until Ms. Weeks was picked up  
12:25:42 20 approximately half an hour or so later.

12:25:45 21 Now, Officer Freedman testified that when  
12:25:47 22 she arrived at District Two station she saw Sergeant  
12:25:51 23 Detective Monahan and asked him if he would want to do  
12:25:54 24 the interview.

12:25:56 25 He asked her -- Detective Monahan asked

12:26:00 1 Officer Freedman if she wanted Detective Monahan to do  
12:26:05 2 the interview and she said yes.

12:26:07 3 She is not sure what she told Detective  
12:26:10 4 Monahan about what had happened -- what the defendant  
12:26:12 5 had said at the time. But she said she may have shown  
12:26:17 6 Detective Monahan the gun and the drugs. And I infer  
12:26:20 7 that she probably did show him the guns and the drugs.

12:26:23 8 Officer Freedman was present when Detective  
12:26:26 9 Monahan administered Miranda warning. She's actually  
12:26:30 10 signed it as a witness and she says that she was not  
12:26:33 11 standing there besides officer -- Detective Monahan as  
12:26:37 12 she questioned the defendant, but that she went to the  
12:26:40 13 next room or area adjoining this area where the  
12:26:44 14 defendant was being questioned by Detective Monahan and  
12:26:47 15 was working on processing the evidence.

12:26:50 16 Officer Freedman did not display a weapon or  
12:26:55 17 threaten the defendant at any time during the time they  
12:26:58 18 were at the Belle Haven parking lot.

12:27:20 19 The defendant was cuffed behind his back by  
12:27:24 20 Officer Freedman before -- and he was in that state when  
12:27:28 21 Officer Vinyard arrived and placed him in the back of  
12:27:30 22 Officer Vinyard's vehicle, police vehicle with his hands  
12:27:36 23 handcuffed behind his back.

12:27:43 24 Officer Freedman did not ask Ms. Weeks about  
12:27:46 25 the gun or the drugs, and her police report did not

12:27:54 1 mention questioning Mr. Turner at the scene, nor did the  
12:28:01 2 criminal complaint mention that.

12:28:14 3           Officer Freedman indicated that she asked  
12:28:16 4 about whether or not the defendant had a permit because  
12:28:18 5 previously several years ago she had a case where a  
12:28:21 6 person was stopped on the Parkway and that person had a  
12:28:25 7 weapon, that she prepared the paperwork for the case,  
12:28:28 8 sent it to the U.S. Attorney's Office and the U.S.  
12:28:31 9 Attorney decided not to charge the individual because  
12:28:34 10 the individual had a permit, even though permits do not  
12:28:37 11 allow -- state permit does not allow a person to carry  
12:28:41 12 weapon on federal property. She thought if he had a  
12:28:45 13 permit that perhaps she would exercise some discretion.

12:28:47 14           The defendant, Mr. Sherman Turner testified  
12:28:49 15 and he admits or agrees that he was in the Belle Haven  
12:28:53 16 parking lot with Ms. Weeks and that Officer Freedman did  
12:28:58 17 come to the truck, shine a light and open the door and  
12:29:03 18 that the officer seemed a bit taken aback to see  
12:29:06 19 Ms. Weeks in a state of undress and that Officer  
12:29:12 20 Freedman told Ms. Weeks to get dressed.

12:29:15 21           And at that point she looked around and  
12:29:17 22 expressed some disbelief that the defendant and  
12:29:21 23 Ms. Weeks would be there doing whatever it appeared that  
12:29:24 24 they were doing.

12:29:25 25           According to Mr. Turner, the officer said if

12:29:29 1 you have an open container -- I see you have an open  
12:29:33 2 container. And if I look, what else will I find? And  
12:29:38 3 the -- Mr. Turner says he said to Ms. -- Officer  
12:29:43 4 Freedman he did not smoke.

12:29:45 5 And at that point, Officer Freedman picked  
12:29:47 6 up the pack of cigarettes. And according to the  
12:29:52 7 defendant he said that Ms. -- Officer Freedman said I  
12:29:57 8 guess that's not yours. And obviously Ms. Weeks was  
12:30:00 9 there as well. And Officer Freedman did not ask  
12:30:05 10 Ms. Weeks if the cigarettes belonged to her.

12:30:08 11 And according to the defendant, Officer  
12:30:12 12 Freedman said not only has he disrespected you in a  
12:30:16 13 public place, but he is -- has the audacity to pin this  
12:30:21 14 on you, meaning that Officer Freedman was saying to  
12:30:25 15 Ms. Weeks that the defendant was taking advantage of her  
12:30:27 16 in a public place and also pinning the drug charge on  
12:30:31 17 her.

12:30:31 18 She did not -- Officer Freedman did not ask  
12:30:35 19 Ms. Weeks about the cigarettes.

12:30:38 20 Mr. Turner recalled there was a helicopter  
12:30:41 21 was shining the light down. And he agreed that Officer  
12:30:47 22 Freedman did handcuff him, acknowledged that he could  
12:30:50 23 not sit down and had him stand at the rear of the  
12:30:53 24 vehicle.

12:30:54 25 And when Officer Vinyard arrived, he,

12:30:57 1 Mr. Turner acknowledges that Officer Vinyard put him in  
12:31:02 2 his police vehicle with his hands behind his back.

12:31:05 3 Now, it seems to me there is some issue,  
12:31:07 4 very mild, about whether Ms. Weeks and Mr. Turner were  
12:31:11 5 placed in the back of these police vehicles whether or  
12:31:14 6 not the windows were down.

12:31:15 7 I infer because it was January, they were in  
12:31:17 8 some state of undress and they had just been putting  
12:31:20 9 their clothes back on that they were put in vehicles  
12:31:23 10 with the windows up.

12:31:25 11 And there was certainly some contact between  
12:31:31 12 Mr. Turner and Officer Freedman about this gun which I'm  
12:31:36 13 going to talk about in just a moment.

12:31:38 14 Mr. Turner said the drug dog did come and  
12:31:40 15 went in and out of his truck and that after he had  
12:31:44 16 gone -- the dog went in and out of his truck that  
12:31:47 17 Officer Freedman came over to the police car and told  
12:31:49 18 him that you're going to be charged with being in a park  
12:31:55 19 after dark, lewd behavior and possession of marijuana.

12:32:00 20 Thereafter, Mr. Turner says that the canine  
12:32:08 21 officer had gone over -- Officer Daugherty had gone over  
12:32:12 22 to the rear of his truck and come over to Mr. Turner and  
12:32:17 23 asked him questions about his truck in terms of what  
12:32:19 24 kind of work did he do, what was the nature of the tools  
12:32:24 25 he had in the back of his truck and Mr. Turner reported



12:32:26 1 that he was an electrician.

12:32:28 2 And thereafter then the officer went back --  
12:32:30 3 Officer Daugherty. And I infer Vinyard as well went  
12:32:36 4 back to his truck and continued searching it. And I  
12:32:39 5 believe that Mr. Turner said that a police officer, I  
12:32:42 6 believe Daugherty found the cane that's not really the  
12:32:46 7 subject matter of this motion to suppress, but a cane  
12:32:48 8 was found in the back seat of the vehicle as well.

12:32:51 9 After that, the front seat was slid forward.  
12:32:56 10 And at some point during this particular point,  
12:32:59 11 according to Ms. -- Officer Freedman and I infer the  
12:33:03 12 defendant that Officer Vinyard observed the weapon.  
12:33:07 13 Then Officer Freedman retrieved the weapon.

12:33:11 14 Now, according to Mr. Turner, at this point,  
12:33:16 15 Officer Freedman came over to the police car, opened the  
12:33:18 16 door and asked him a series of questions. The questions  
12:33:22 17 according to Mr. Turner were what kind of gun is that?  
12:33:26 18 That was the first question. Second -- and he  
12:33:28 19 apparently answered Glock 26. The second, is this --  
12:33:32 20 and this is not yours, right? Or this is yours, right?  
12:33:36 21 And then she asked him do you have a permit. And  
12:33:38 22 according to the defendant he said whatever in a flip  
12:33:41 23 fashion.

12:33:41 24 And at -- additionally, Officer Freedman  
12:33:47 25 asked Mr. Turner, have you been convicted of a felony.

12:33:51 1 And the defendant reported, yes, I had been convicted of  
12:33:54 2 a felony 20 years ago in 1983 or '84.

12:33:59 3 Mr. Turner reports being taken to the police  
12:34:02 4 station in the holding area. He said that Officer  
12:34:06 5 Freedman was present when he was given Miranda warnings.  
12:34:10 6 He described it as being in another room, but it was in  
12:34:13 7 an area where she could see him and he could see her,  
12:34:16 8 although he did not report seeing her again after he saw  
12:34:19 9 her on the scene and at the police station when the  
12:34:21 10 Miranda warning was done.

12:34:22 11 And Detective Monahan he says -- Mr. Turner  
12:34:26 12 says did administer Miranda warning. He answered the  
12:34:30 13 questions after being informed of his rights.

12:34:34 14 So, the question presented is first whether  
12:34:52 15 the defendant was in custody for purposes of Miranda on  
12:34:56 16 the scene at the Belle Haven parking lot when Officer  
12:35:01 17 Freedman went over to ask him questions about this gun.

12:35:04 18 I think that the key question is whether or  
12:35:09 19 not he was in custody for purposes of Miranda and  
12:35:12 20 whether he was entitled to Miranda warnings at that  
12:35:14 21 point.

12:35:15 22 I found that he was in custody and that he  
12:35:17 23 was entitled to Miranda warnings because he was in  
12:35:19 24 handcuffs. He had been locked in the back of the police  
12:35:22 25 cruiser. The officer had already made a judgment to

12:35:25 1 charge him at the very least with some offense involving  
12:35:30 2 this marijuana.

12:35:31 3 She had the drug dog there. She called for  
12:35:34 4 backup. And the defendant's vehicle had been -- she was  
12:35:39 5 making arrangements for his vehicle to be taken away.

12:35:41 6 At that point, I think that he was entitled  
12:35:43 7 to a Miranda warning. It's not about whether or not he  
12:35:48 8 was free to leave. I think that he had been  
12:35:50 9 sufficiently placed in custody at the point which he was  
12:35:58 10 handcuffed in the police car, his liberty restrained,  
12:36:01 11 and his vehicle basically being impounded. And she had  
12:36:07 12 found the marijuana. So I think that he, Mr. Turner was  
12:36:13 13 entitled to Miranda warning from Officer Freedman.

12:36:17 14 I think Officer Freedman's questions about  
12:36:19 15 the gun were intended to elicit a response. And that  
12:36:23 16 response, whatever it would have been would have been  
12:36:25 17 incriminating. You can't have a gun in the park. He  
12:36:28 18 was in the park with a gun. It didn't matter whether he  
12:36:31 19 had a felony record or not. If he had a gun in the  
12:36:34 20 park, that's against the law for which he could be  
12:36:36 21 charged.

12:36:36 22 And while I understand what Officer Freedman  
12:36:39 23 said about her -- she says her thought process, I still  
12:36:43 24 think for purposes of the Fifth Amendment analysis that  
12:36:47 25 he would have been entitled to his Miranda warning. And

12:36:50 1 the -- that she knew or reasonably should have known  
12:36:54 2 that this question was likely to elicit an incriminating  
12:36:58 3 response under *Rhode Island versus Innis*.

12:37:01 4 Now, the case law that I think we have to  
12:37:06 5 consider *Elstad, Missouri versus Seibert* and I think the  
12:37:12 6 key case for this decision today is *Mashburn* from the  
12:37:17 7 Fourth Circuit is whether the initially unwarned  
12:37:20 8 statements rendered involuntary the statements the  
12:37:23 9 defendant made after receiving and waiving Miranda  
12:37:25 10 rights.

12:37:26 11 Now, the burden is on the government to  
12:37:32 12 establish that the statement was voluntary and  
12:37:36 13 admissible under Miranda.

12:37:38 14 The Miranda warnings are typically thought  
12:37:40 15 to be the way the government would establish that a  
12:37:44 16 person was fully informed of their rights and that their  
12:37:47 17 rights were voluntarily and -- knowingly and voluntarily  
12:37:50 18 waived.

12:37:52 19 And the case that the government is trying  
12:37:58 20 to address and the subject of this motion to suppress is  
12:38:03 21 whether Detective Monahan's questioning of the defendant  
12:38:09 22 was a part of the deliberate two-stage interrogation  
12:38:14 23 strategy that was used to obtain a post-warning  
12:38:18 24 confession. That is to say that it was a part of some  
12:38:22 25 plan, whether it was deliberate police policy or not

12:38:26 1 between Officer Freedman and Detective Monahan to  
12:38:29 2 subvert the defendant's Fifth Amendment rights here.

12:38:32 3 I acknowledge that the Fourth Circuit has  
12:38:35 4 said that it has not decided who has the burden of  
12:38:38 5 proof. But it seems to me that the government has the  
12:38:41 6 burden of proof and so that burden is on them.

12:38:43 7 Here, Officer Freedman's testimony is that  
12:38:47 8 at the scene she had not talked to Officer Monahan about  
12:38:53 9 questioning the defendant, had not really given thought  
12:38:56 10 to what she would do at the police station.

12:38:59 11 As I heard her testimony and viewing her  
12:39:02 12 testimony in the light in terms of weighing the  
12:39:05 13 credibility, it seemed credible to me when she was at  
12:39:08 14 the police station it was almost -- it was not  
12:39:11 15 intentional or not preplanned that Detective Monahan  
12:39:14 16 would be there, that her sergeant would be there.  
12:39:16 17 Remember, this is the middle of the night.

12:39:18 18 Detective Monahan is a detective and she's  
12:39:20 19 not. She's a patrol officer. And her reasons for  
12:39:24 20 allowing Detective Monahan to conduct the interview  
12:39:26 21 where she thought he might be more skilled at it seems  
12:39:29 22 reasonable to me and credible. So I credit that  
12:39:33 23 testimony.

12:39:34 24 She did not testify that there was any plan  
12:39:38 25 on her part to somehow undermine the defendant's Miranda

12:39:45 1 rights. And the Court in *Missouri versus Seibert*  
12:39:53 2 plurality opinion, I think everyone now agrees that we  
12:39:56 3 got to view that opinion and focus more on what Justice  
12:40:00 4 Kennedy said the test is.

12:40:04 5 But, the bottom line is I think that the  
12:40:07 6 case is governed by *Elstad*. And the focus should be on  
12:40:13 7 whether the second statement was knowingly and  
12:40:16 8 voluntarily made.

12:40:19 9 And, the Court in the *Missouri versus*  
12:40:23 10 *Seibert* case says that absent deliberately coercive or  
12:40:27 11 improper tactics to obtain the initial statement, the  
12:40:29 12 mere fact that a statement has been made -- a suspect  
12:40:33 13 has made unwarned admission does not warrant a  
12:40:36 14 presumption of compulsion as any subsequent warned  
12:40:40 15 statement.

12:40:40 16 And so what I have to do here is decide if  
12:40:43 17 there was any plan. And I think that there is no  
12:40:47 18 evidence here to support the idea that there was some  
12:40:50 19 plan between Officer Freedman and Detective Monahan.

12:40:56 20 I have considered the factors that are set  
12:40:58 21 forth in *Seibert* about the completeness and details in  
12:41:01 22 the questioning as it's been described to me.

12:41:02 23 Detective Monahan's questioning of the  
12:41:05 24 defendant included questions about his military history,  
12:41:08 25 his family, his prior -- the defendant's prior law

12:41:14 1 enforcement background. That's much more detailed than  
12:41:16 2 the statements that were elicited by Officer Freedman at  
12:41:20 3 the scene.

12:41:21 4 Obviously the content of the statement does  
12:41:24 5 overlap. That is to say the two statements do focus in  
12:41:26 6 on the defendant's status and possession of the weapon.

12:41:30 7 The timing and setting of the first and  
12:41:33 8 second statement, well, it's apparently two hours  
12:41:36 9 between the time of the initial questioning by Officer  
12:41:39 10 Freedman and the questioning at the police station.

12:41:41 11 The continuity of the personnel, obviously  
12:41:44 12 the questions are different. We have Detective Monahan  
12:41:49 13 asking questions after giving Miranda warning as  
12:41:51 14 distinct from Officer Freedman at the scene. And the  
12:41:55 15 fact, the degree to which the interrogated questions  
12:41:58 16 treated the second round is continuous with the first.

12:42:01 17 I don't think there's any evidence here of  
12:42:03 18 what Detective Monahan did except what has been elicited  
12:42:06 19 and that does not -- from the defendant, and that does  
12:42:09 20 not seem to suggest to me it was continuous because  
12:42:13 21 according to the defendant, the questions asked by  
12:42:17 22 Officer Monahan focused on several areas that were not  
12:42:19 23 encompassed in the initial questioning by Officer  
12:42:19 24 Freedman.

12:42:25 25 So, I don't think we have an issue where I

12:42:28 1 need to focus in on *Seibert*, but then to focus in on  
12:42:33 2 *Elstad*.

12:42:33 3 And obviously the issue in *Elstad* is one of  
12:42:38 4 voluntariness. And where a Miranda warning has been  
12:42:44 5 given, the Court has to look at whether the second  
12:42:48 6 statement was voluntarily made.

12:42:50 7 Obviously the defendant here had an idea  
12:42:52 8 that he was in some trouble in the middle of the night  
12:42:55 9 with a gun on the Parkway when he was taken into custody  
12:43:01 10 and Ms. Weeks was not.

12:43:04 11 And apparently the defendant, you know, had  
12:43:08 12 reason to be concerned about this. And so, I don't  
12:43:11 13 think that he was coerced by Detective Monahan when  
12:43:16 14 Detective Monahan read him the Miranda warnings and the  
12:43:19 15 defendant made a decision to answer questions. He  
12:43:24 16 certainly did not have to. He was not being threatened  
12:43:28 17 in any way.

12:43:28 18 Ms. -- Officer Freedman was not present  
12:43:32 19 participating in any questioning. And so I think that  
12:43:36 20 in this situation that what I have here is an absence of  
12:43:42 21 evidence that Officer Freedman deliberately employed a  
12:43:46 22 question-first interrogation strategy and that the  
12:43:51 23 Miranda warnings were required at the scene. And since  
12:43:56 24 she did not give them, I will suppress any statement  
12:44:01 25 defendant made to Detective Freedman because it violates



12:44:04 1 Miranda and she should have given that warning.

12:44:06 2 As it relates to statements made to  
12:44:09 3 Detective Monahan since these statements were made after  
12:44:11 4 he received a Miranda warning at the police station some  
12:44:14 5 two hours later and for the reasons I've already  
12:44:17 6 outlined, I think that the statements are knowingly and  
12:44:19 7 voluntarily made. So the statement to Detective Monahan  
12:44:22 8 will be received.

12:44:23 9 So, the motion to suppress is granted in  
12:44:25 10 part and denied in part. Thank you. You all are  
12:44:30 11 excused.

12:44:32 12 MS. AHMAD: Thank you, Your Honor.

12:44:32 13 THE COURT: Thank you.

12:44:56 14 Let me make one other statement here.

12:44:58 15 Mr. Barker, I don't know you, and I don't want you to  
12:45:02 16 take my earlier statements as to suggest that you have  
12:45:04 17 withheld exculpatory evidence. I didn't say that, and I  
12:45:08 18 did not intend to suggest that.

12:45:09 19 MR. BARKER: Thank you, Your Honor.

12:45:10 20 THE COURT: But I do believe and I hope that  
12:45:13 21 you all know that the judge expects that the defense  
12:45:17 22 would cooperate with the government.

12:45:19 23 And I appreciate the defense trying to let  
12:45:21 24 me know that they weren't blaming you, that they were  
12:45:24 25 blaming the Park Police.

12:45:25 1 And hopefully the Park Police will get the  
12:45:29 2 message that everybody ought to work together here to  
12:45:31 3 insure that we can put on a case.

12:45:33 4 MR. BARKER: Thank you, Your Honor.

12:45:34 5 THE COURT: So, I take back any intent to  
12:45:37 6 suggest to you that I was insulted. I'm not insulted.  
12:45:40 7 I'm just trying to make sure everybody was on the same  
12:45:43 8 page.

12:45:43 9 MR. BARKER: Thank you.

12:45:47 10 (Proceeding concluded at 12:45 p.m.)

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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of United States of America vs. Sherman Alan Turner.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 122, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 18th day of February, 2010.

/s/

Renecia Wilson, RMR, CRR  
Official Court Reporter